91-1468

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JON G. MURRAY, and
SOCIETY OF SEPARATIONISTS, INC.
. . . . . Petitioners,

v.

CITY OF AUSTIN, TEXAS, and
TRAVIS COUNTY, TEXAS,
. . . . . Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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February 28, 1992

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Question Presented for Review

I

Whether the permanent indicia or logo of the City of Austin, Texas, may, consistent with the Establishment Clause of the First Amendment to the Constitution of the United States, include the display of a Christian cross.

List of All Parties

JON G. MURRAY, and

THE SOCIETY OF SEPARATIONISTS, INC.

Petitioners and Plaintiffs below.

THE CITY OF AUSTIN, TEXAS, and

COUNTY OF TRAVIS, TEXAS

Respondents and Defendants below.

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Opinions Below

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

The opinion rendered by the United States District Court for the Western District of Texas, Austin, Division, reported at 744 F.Supp. 1771, which denied the relief requested by Petitioners herein, appears in Appendix A herein.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The opinion of the Fifth Circuit Court of Appeals, not yet reported, which affirmed the ruling of the lower court, appears in Appendix B herein.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Denial of Motion for Rehearing appears in Appendix C herein.

Jurisdiction

The jurisdiction of this Court is invoked on the grounds that (a) the United States Court of Appeals for the Fifth Circuit has decided a question of federal law herein which conflicts with the decisions of other United States Courts of Appeals on the same matter; and (b) the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. Jurisdiction in this Court is invoked pursuant to 28 U.S.C., Section 1254.

The final judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 4, 1991. A timely petition for panel rehearing was denied on December 3, 1991, and this petition for certiorari is filed within 90 days of that date.

Jurisdiction of this Court is also invoked under 28 U.S.C. § 2102(c) and 28 U.S.C. § 1254(1).

Constitutional Provisions

CONSTITUTION OF THE UNITED STATES

FIRST AMENDMENT

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Statement of Proceedings and Disposition in the Courts Below:

Petitioners filed their Original Complaint in this action on May 28, 1987, seeking preliminary and permanent injunctive relief and a declaratory judgment. Petitioners complained of the permanent inclusion in the official municipal logo (insignia) of the City of Austin, Texas, of a sectarian, Roman Catholic Christian cross; such being a violation of the First and Fourteenth Amendments to the Constitution of the United States. Petitioners and the City of Austin, Texas, Respondents, agreed to submit the case to the District Court by cross-motions for summary judgment, and on June 1, 1988, the District Court had before it the cross-motions. Two years and three months later the District Court held that the seal did not violate the First and Fourteenth Amendments and granted Respondent's motion; denied Petitioners' motion; dismissed the state constitutional claims, and awarded costs and attorneys' fees under Rule 11 of the Federal Rules of Civil Procedure to Respondents.

On appeal to the United States Court of Appeal for the Fifth Circuit, a panel consisting of Circuit Judges Goldberg, Smith and Barksdale heard oral argument on April 30, 1991. On November 4, 1991, Judge Barksdale was joined by Judge Smith in the majority opinion which affirmed the District Court's final summary judgment on the merits but vacated the District Court's imposition of sanctions. Judge Goldberg dissented on the merits and also filed an opinion. Petitioners' petition for rehearing was denied on December 3, 1991.

Statement of Facts

The City of Austin, Texas, currently displays in its official, municipal insignia or logo, a design that includes a Christian cross, and though small in relation to the totality of the surface area of the insignia, the cross is a prominent part of the City's permanent, governmental emblem. The City's indicia is displayed and used extensively by the government of Austin and throughout the City.

The cross is located in the upper mid-section (center) of the circular seal. It is surrounded by a pair of wings. The gold- colored cross is superimposed upon a dark silhouette of the State Capitol building of the State of Texas, which is located in Austin. Below these designs is found the design of a lamp imposed upon a tri-bannered shield. "CITY OF AUSTIN * * FOUNDED * * 1839" circumscribes the other designs. A representation of the insignia appears in the Appendix.

After research into the origins of and motivation for the seal, no evidence was found suggesting that the motivation for the inclusion of the cross in the seal was for any improper purpose.[11]

Petitioners submitted their claim of unconstitutionality primarily based upon the "religious effect prong" of the *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971), Establishment Clause test.

Court of Appeals Jurisdiction

Jurisdiction in the Court of Appeals was properly invoked pursuant to 28 U.S.C. Section 1291.

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[1]Petitioners' research (and that of the Respondents) revealed that the cross, as it appears in the seal today, is apparently a part of one truncated version of the family coat-of-arms of Stephen F. Austin, the founder of Austin, Texas. The coat-of-arms was altered by the City for inclusion in the suggested design of the seal. The wings surrounding the cross are also allegedly part of the original Austin coat-of-arms. The Capitol silhouette does in fact represent the Capitol building, and denotes the fact that Austin is the seat of government of the State of Texas. The lamp denotes the fact that Austin hosts many educational establishments.

Argument for Granting The Writ

1. THE DECISION OF THE COURT OF APPEALS BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE CONSTITUTIONALITY OF THE PERMANENT DISPLAY OF A CHRISTIAN CROSS IN AN OFFICIAL GOVERNMENTAL INSIGNIA OR LOGO.

The Fifth Circuit, in its 2-1 decision, held below that the inclusion of the primary and most powerful symbol of the Christian faith in the permanent, official, municipal insignia or design logo of the City of Austin (which is used pervasively throughout the City), does not convey a message of governmental endorsement of Christianity to the average person who views it. Any such message was held to be nullified or negated by the small size of the cross as well as by the inclusion of other secular symbols in the insignia. The majority opinion also took great consideration of the fact that the City apparently did not intend to endorse Christianity.

The majority opinion held that the seal did not violate the Establishment Clause of the First Amendment because it did not demonstrate a symbolic union of the City and Christianity or, alternatively, that any such religious preference was remote. The majority relied largely upon the inapposite case of *Marsh v. Chambers*, 463 U.S. 783 (1983), and statements in the clearly distinguishable case of *Lynch v. Donnelly*, 465 U.S. 668 (1984), which involved a short-term holiday display, where the Court held that religious symbolism should not be viewed in isolation but within its unique context. The majority further cited *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), and attempted to distinguish the holding as to the crèche and align the facts sub judice with the menorah holding of *Allegheny*. The majority also cited and attempted to distinguish Justice Kennedy's statement in his concurring and dissenting opinion in *Allegheny* regarding the indisputable unconstitutionality of a year-round display of a Christian cross. (*Id.* at 661)

The holding, and rationale leading thereto, of the majority is unsound and incongruous with recent Supreme Court opinions

dealing with the effect prong of the *Lemon* test. More importantly herein, the holding engenders a direct and irreconcilable conflict on the federal constitutional issues between the Fifth Circuit and the Seventh and Tenth Circuits. The latter Circuit Courts have each held that the display of a Christian cross in a governmental seal is unconstitutional under the Establishment Clause (discussed infra).

THE ESTABLISHMENT CLAUSE GENERALLY

The Establishment Clause of the First Amendment to the Constitution of the United States (made applicable to the States and their subdivisions through the Fourteenth Amendment (*County of Allegheny v. ACLU*, 492 U.S. 573 (1989) and *Wallace v. Jaffree*, 472 U.S. 38 (1985)), demands that no governmental entity promote, endorse, or affiliate itself with any religious doctrine or organization. In its tumultuous history of dealing with the Establishment Clause, this Court has almost unanimously agreed upon one proposition: a government may not show preference for one religion or sect over another. *Everson v. Board of Education*, 330 U.S. 421, 15 (1947). In *Wallace*, 472 U.S. at 113 (1985), (Rehnquist, J., dissenting), the current Chief Justice stated that the Establishment Clause was designed to stop "government from asserting a preference for one religious denomination or sect over others."

In *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971), this Court enunciated three principal tests for determining whether a governmental act violates this critical directive found in the first clause of the first article of the Bill of Rights: the act must have a secular purpose; the act must have a secular effect in that it neither advances nor inhibits religion; and the act must not foster an excessive entanglement between government and religion. A violation of any one of these subtests requires that the act be held unconstitutional. Petitioners base their claims herein challenging the permanent governmental display of the prominent symbol of Christianity, on the "effect prong" of the *Lemon* test. Petitioners assert an affirmative answer to the questions:

> [w]hether the symbolic union of church and state effected

by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as endorsement, and by the nonadherents as disapproval, of their individual religious choices.

Grand Rapids School District v. Ball, 473 U.S. 373, 390 (1985) and similar statement in *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

In 1989 this Court issued its decision in *County of Allegheny*, supra, where the fragmented Court held that the exhibition of a temporary holiday display, a crèche inside the Allegheny County Courthouse, had the impermissible effect of endorsing religion generally and Christianity specifically. The operative opinion of the "Court" also held that the display of a menorah outside the Pittsburgh City/County building did not have an impermissible religious effect. This seemingly contradictory holding is (somewhat) rationalized by the Court's reliance on its previous opinion in *Lynch*, 465 U.S. 668 (1984), (primarily Justice O'Connor's concurring opinion), involving a similar issue regarding ephemeral holiday displays. In *Lynch*, five members of the Court agreed that a government's use of a religious symbol in such displays must be viewed in its particular context or physical position, and that if any possible perceived religious endorsement is not totally negated by other secular symbols or circumstances, the use must be discontinued.

In *County of Allegheny*, the Court held that nothing in the display surrounding the crèche detracted from its endorsement of the religious and Christian message conveyed by the crèche. The Court also noted the prominent and particularly central location of the crèche inside the official, governmental building: the location "on the Grand Staircase," (*County of Allegheny*, 492 U.S. at 579), indicated an intimate association with the local government.

Justice Blackmun, with four members concurring, held that the menorah outside the City/County building was constitutionally displayed since the surrounding objects tended to totally negate any religious significance that a menorah may contain. The opinion, in fact, downplays the religious significance of the menorah

and compares its effect to that of the Christmas tree situated next to it. The opinion seems to suggest that, in the holiday context, both the Christmas tree and the menorah are only symbols of a secular holiday season. In any event, pursuant to *Lynch*, Justice Blackmun stated that the menorah's physical position and the presence of the other secular objects within the particular physical setting (a lighted Christmas tree and "salute to liberty" sign), are "obviously relevant in determining the effect of the menorah's display," (*Id.*, at 579), and the total display was held to be reflective of the local government's secular recognition of different traditions for celebrating the winter holiday season. (*Id.*, at 580-82.)

To analyze the use of the undeniably religious symbol in the action sub judice *vis-à-vis* *County of Allegheny*, the Christian cross in the official seal of the City is surely more akin to the crèche which was more intimately associated with the governmental entity. A nativity scene is also more religious than a menorah (at least to the court in *County of Allegheny*), and thus, its association with government was more carefully scrutinized. The Christian cross easily trumps a nativity scene as a strong symbol of Christianity, and Petitioners would claim that any display of it by a governmental entity would violate the Establishment Clause. A Christian cross, unlike a menorah, could not be claimed to lose its religious symbolism merely because of its inclusion in an ephemeral holiday display or the like. (See for example *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), discussed below.) To most persons a cross, at the very least, symbolizes religion generally, but to all non-Christians, a cross strongly symbolizes Christianity. (See *Note*, "Of Crosses and Crèches; The Establishment Clause and Publicly Sponsored Displays of Religious Symbols," 35 Am.U.L.Rev. 477, 512-114 (1986).

The religious message conveyed by a cross is not lost when it is removed from the churches, cathedrals and chapels with which it is traditionally associated. In *Greater Houston Chapter of ACLU v. Eckles*, 589 F.Supp. 222 (S.D. Tex. 1984), appeal dismissed, 755 F.2d 426 (5th Cir.), *cert. denied*, 474 U.S. 9080 (1985), (display of Christian crosses and a Star of David in public park held unconstitutional), the court stated that "[t]hese permanent

symbols become state symbols when placed in a public park, and they convey a purely religious message." *Id.*, at 234. The court distinguished the nativity scene controversy by stating that "[t]here is no danger here that the government's use of the symbols will be mistaken as merely a temporary governmental celebration of a religious holiday that has acquired some secular flavor." *Id.* at 235. See also *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986).

Thus, on the issue of religious symbol displays, *County of Allegheny* is not factually on point herein: *County of Allegheny* dealt with ephemeral holiday displays on government property exhibited for only a month or so. Petitioners herein challenge a sectarian, religious display of a Christian cross in the permanent, official insignia of their municipality — there could be no more official symbol of government than its insignia or logo. Contrary to the conclusion of the majority opinion below, the inclusion of the symbol of a particular faith in such an official emblem could only relay a message of endorsement and approval. It is difficult to imagine how such a strong, religious symbol, permanently displayed, could effectively be negated by other symbols or circumstances. It should be here noted that Justice Brennan, in his *Lynch* dissent, states: "[t]he Court's decision implicitly leaves open questions concerning the constitutionality of the public display . . . of other distinctly religious symbols such as a cross." *Lynch*, 465 U.S. at 695 (Brennan, J., dissenting).

Of more critical importance to the facts herein, is the nature of the other secular symbols that Appellees and the District Court below claim do in fact nullify the religious effect of the cross. The cross (golden or light colored, enveloped in a pair of wings) is displayed upon the silhouetted design of the Capitol of the State of Texas. The cross actually appears as if it were three-quarters as high as the Capitol dome. Further, the cross appears above what some people at least would perceive as a lamp of knowledge. Even in the context of an ephemeral holiday display, this assumedly secular symbol in its position in the design would not be considered enough to negate the clear religious significance of the cross. In any event, the seal of Austin is not temporarily displayed in one location in the City in honor or recognition of

a secularized holiday: the seal is pervasively used to definitively proclaim the official, governmental nature of city communications and to mark the various objects and buildings upon which it is exhibited.

Like the floral decorations and Christmas greenery surrounding the crèche in *County of Allegheny* which "only framed the display and contributed to the religious message of the crèche," (*Id.*, 109 S.Ct. at 3104), the other symbols in the Austin seal only draw visual attention to the golden, wing-enshrouded Christian cross in its high-central position in front of the Texas State Capitol. Of particular note in the opinion of the Court in *County of Allegheny*, *Id.*., it is stated in revealing dictum that:

> It is as if the county had allowed the Holy Name Society to display a cross in the Grand Staircase at Easter, and the county had surrounded the cross with Easter lilies. The county could not say that surrounding the cross with traditional flowers of the season would negate the endorsement of Christianity conveyed by the cross on the Grand Staircase.[2]

Likewise, the City of Austin cannot say that the powerful religious message conveyed by the Christian cross is negated by other secular symbols. Pursuant to Justice O'Connor's concurring opinion in *Lynch* (as bolstered in *County of Allegheny*), any apparent endorsement of religion is unacceptable and the "particular physical setting" of a religious display is the important criterion in determining if a religious message is otherwise negated. The "particular physical setting" here is an official municipal

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[2]Justice Kennedy, in his dissent, *Id.*, 109 S.Ct. at 3137, characterized a hypothetical cross erected on the roof of city hall as an example of an "obvious effort to proselytize on behalf of a particular religion." For this proposition, Justice Kennedy cited *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985), (Christian cross displayed as part of the design of a county's official seal — discussed below). He also stated that a *year round* display of a cross "would place the government's weight behind Christianity."

insignia or logo. The "unique context" to be looked to in this case includes a bold representation of Texas' paradigmatic government symbol — the State Capitol building upon which the cross is displayed. These circumstances serve only to bolster the inappropriate connection between government and religion.

The Christian cross is not a traditional symbol of the City of Austin, Texas, which when transitorily viewed with other secular symbols would negate the message of religious endorsement by the City. Here the strongest secular symbol in the silhouette is the Texas State Capitol, a powerful governmental symbol. Thus, it reasonably appears from the totality of the circumstances, that the City of Austin prefers its citizens to adhere to the Christian faith. A more effective method of placing the City of Austin's governmental imprimatur of approval on the particular religious beliefs symbolized by the Christian cross, would be difficult to imagine.

In this regard, the majority based its opinion upon an erroneous application of the "secular context" doctrine originally enunciated in *Lynch*. (O'Connor, J., concurring), and reaffirmed in *County of Allegheny*. The majority overlooked the fact that other symbols in the seal could not possibly negate the strongly religious effect of a permanently displayed Christian cross. Further, the other secularizing symbols contain distinct, in fact quintessential, governmental images. The overall, unique physical context, crucial to the determination to be made herein, happens to be *the* permanent symbol of government of the City of Austin — its official indicia. This is not a situation akin to an ephemeral holiday display on public property.

Petitioners would also contend that the Austin indicia would fail any of the proposed Establishment Clause tests enunciated by the various members of this Court in recent concurring and dissenting opinions. (See *County of Allegheny, Wallace v. Jaffree*, 472 U.S. 38 (1985), *Lynch* and *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), for example.)

THE CONFLICTING OPINIONS OF THE SEVENTH AND TENTH CIRCUITS

In cases dealing with issues factually indistinguishable from that sub judice, the following Circuit Courts, relying inter alia, upon the opinions of this Court cited above, have reached the opposite conclusion of the Fifth Circuit.

SEVENTH CIRCUIT

In *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), (a case dealing with the display of Christian crosses in the municipal seals of two different northern Illinois cities), the Seventh Circuit held that the City of Zion had an improper religious purpose in displaying in its seal several religious symbols, including a cross, all of which the city contended were of historical significance. The court also stated that the seal violated the religious effects prong of the *Lemon* test. (*Id.*, at 1249.) In the same opinion, the court held unconstitutional the use of the seal of the City of Rolling Meadows which contained a Christian cross and other secular representations. This seal displayed the cross "in scene-form" with three other secular scenes of the city: an "industrial" scene, a design of a typical home in Rolling Meadows, and a stylized leaf. The only distinguishing feature of the Rolling Meadows seal from that sub judice is the fact that the cross appears in scene-form as only one of the depicted aspects of life in Rolling Meadows. In the case sub judice, the cross is not depicted in any scene-form but as a bold symbol in and of itself surrounded by, ostensibly, ecclesiastic wings (e.g. angel wings). Additionally, the Austin cross is situated directly in front of what all observers would recognize as *the* quintessential governmental building for the State of Texas — its Capitol. As in *Harris* but more strongly so herein, the sum of the individual symbols imparts a strong message that the government of the City of Austin endorses the religion of Christianity. Also as in *Harris*, there are no sufficient secularizing components in Austin's seal to offset this endorsement message.

As a practical matter, the facts pertaining to the Rolling Meadows portion of the *Harris* decision are indistinguishable from that

sub judice. The Seventh Circuit summarized its holding by saying that, " . . . sectarian religious imagery simply has no place on municipal seals." In his dissent on other grounds, Circuit Judge Easterbrook would seem to concur with this statement (see *Harris*, 927 F.2d at 1420, J. Easterbrook dissenting) which clearly places the Seventh and the Fifth Circuits in conflict.

TENTH CIRCUIT

In *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), the Tenth Circuit, en banc, held that the seal of a New Mexico county which contained a Christian cross (along with other symbols including eight sheep, a landscape plain, sky, and four mountains), did not pass the effects prong of the *Lemon* test. The court stated that the effect upon the average, non-Christian observer of the seal was that the county had placed its "power, prestige and financial support . . . behind a particular religious belief." (*Id.*, at 782) The court further held that "religious minorities may not be made to feel like outsiders because of government's malicious or merely unenlightened endorsement of the majority faith." [emphasis added] (*Id.*, at 781-82.) Of particular importance to the court (and the point of primary, factual distinction between this case and *Lynch*, supra), was the fact that the seal was a permanent governmental display and that is presence in the county area was pervasive. It is difficult to differentiate the *Bernalillo* case from the case sub judice other than to note the mere size difference of the two crosses.

This conflict between the Circuits justify the grant of certiorari to review the judgment below.

2. THE DECISION OF THE COURT OF APPEALS BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE CONSTITUTIONALITY OF THE PERMANENT DISPLAY OF SECTARIAN RELIGIOUS SYMBOLS IN OFFICIAL GOVERNMENTAL SEALS, INDICIA, OR LOGOS WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In addition to the cases involving crosses cited above, there are several other federal cases involving the display of other religious symbolism in official governmental seals.

In *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989), the Tenth Circuit again reversed a district court's ruling that a governmental seal did not violate the First Amendment (dismissal of the plaintiff's action treated as summary judgment), and held that it was a question of fact whether the depiction of a Mormon temple among a number of secular symbols, in a city's seal violated the Establishment Clause as an impermissible endorsement of religion generally and the Mormon faith particularly. The court remanded for a trial on the merits but, subsequent to this ruling, the city voluntarily ceased using the seal and settled with the plaintiff on the attorneys' fees issue. The Tenth Circuit had the benefit of the Supreme Court's ruling in *County of Allegheny*, and made the above holding based largely on the Supreme Court's decision therein. Comparing the seal at issue in *Foremaster* and the insignia involved herein, one could find no possible distinguishing feature of the two, other than that the disputed symbol in Austin's insignia is much more obviously religious. See Appendix A-2.

In *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987), the Eleventh Circuit reversed the district court's dismissal for lack of standing of the plaintiff's complaint. The court strongly intimated that the inclusion in the city's seal of the word "CHRISTIANITY" (which, in some of its presentations, was practically illegible), in its official seal was a violation of the Establishment Clause, and that the issues in this case were similar to the issues in *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983). *Rabun* upheld the lower court's ruling that a cross displayed in a state park failed each of the *Lemon* test prongs. The city subsequently abandoned the cross.

In *Saladin*, the court suggestively noted the quintessentially governmental and official nature of a municipal seal. The court also dismissed the lower court's assertion that since the religious word was tiny in comparison to the totality of the seal and since the word was sometimes completely illegible, that these facts

were, in any way, relevant (at least certainly for standing purposes). Again, comparing the seal involved in *Saladin* and the insignia involved herein, one could find no possible distinguishing feature of the two, other than that the disputed symbol herein is more striking.

3. THE DECISION OF THE COURT OF APPEALS BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE CONSTITUTIONALITY OF THE DISPLAY OF CHRISTIAN CROSSES BY GOVERNMENTAL ENTITIES WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

No federal court, prior to the Fifth Circuit's opinion herein, has tolerated the display of a Christian cross by a governmental entity — under any circumstances.

In *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), the Seventh Circuit affirmed the district court's ruling preliminarily enjoining a city's display of a Christian cross on a governmental building for the Christmas season. After noting that the cross is the principal symbol of Christianity, the court stated that:

> [W]hen prominently displayed on a public building that is clearly marked as and known to be such, the cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be. Such a display is not only religious but sectarian [and] . . . the more sectarian the display, the closer it is to the original targets of the [Establishment Clause], so the more strictly is the clause applied. *Id.* at 271.

After distinguishing the *Lynch* case by noting the fact that a Christian cross has very little relevance to a Christmas celebration, the court held that the display of the cross could not withstand First Amendment scrutiny, even considering its physical context, as its display too closely allied the city with a sectarian religious faith. The court noted the city's concession that if it were to display the cross year round, it would be the violating the Es-

tablishment Clause.

In *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3rd Cir. 1980), *cert. denied* 451 U.S. 987 (1981), the Third Circuit prohibited the display of, inter alia, a large Christian cross by the City of Philadelphia for a papal visitation. Even though the duration of the display was to be for less than ten days, the display too closely associated the city with religion generally and Roman Catholicism specifically.

In *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983), the Eleventh Circuit upheld the lower court's ruling that a cross displayed in a state park failed each of the *Lemon* test prongs. The court stated that since the cross is a universally recognized symbol of Christianity, the government may not participate in its display.

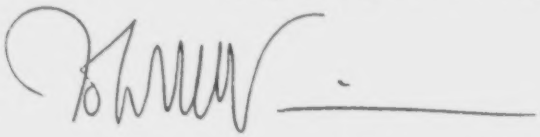
In the following district court opinions, the display of Christian crosses was enjoined or otherwise held prohibited under the Establishment Clause: *Mendelson v. City of St. Cloud*, 719 F.Supp. 1965 (M.D. Fla. 1989), (permanent display of Christian cross on city water tower unconstitutional); *Jewish War Veterans of United States v. United States*, 695 F.Supp. 3 (D.D.C. 1988), (Christian cross could not be displayed on government property as a memorial to servicemen missing in action); *ACLU of Mississippi v. Mississippi State GSA*, 652 F.Supp. 380 (S.D. Miss. 1987), (holiday season display of lighted cross atop state office building enjoined); *Libin v. Town of Greenwich*, 625 F.Supp. 393 (D. Conn. 1985), (holiday season display of illuminated cross on the facade of the town firehouse held unconstitutional); and *Greater Houston Chapter of ACLU v. Eckles*, 589 F. Supp. 222 (S.D. Tex. 1984), appeal dismissed, 755 F.2d 426 (5th Cir.), *cert. denied*, 474 U.S. 980 (1985), (display of Christian crosses and Star of David in public park held unconstitutional).

CONCLUSION

The majority opinion of the Fifth Circuit herein conflicts with every other federal case found dealing with the governmental display of Christian crosses. More narrowly and significantly for this Petition, the opinion directly and irreconcilably conflicts with

opinions of the Seventh and Tenth Circuits on the issue of the display of a Christian cross in a governmental seal, indicia, or logo. Such a display of a Christian cross has the impermissible primary effect of officially recognizing and endorsing the religion of Christianity and places the city's official seal of approval on one particular religious view. Nothing could secularize the display and certainly not the type of symbols that surround the cross which themselves further engender strong governmental endorsement. This Court should grant certiorari to settle the conflicts engendered by the Fifth Circuit's opinion.

Respectfully Submitted,



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Attorney for Petitioners:
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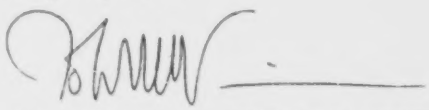
Certificate of Service

I, John W. Vinson, hereby certify that I have mailed the required copies of the foregoing Petition for Writ of Certiorari to:

Ms. Orlinda Naranjo,
Assistant City Attorney,
City of Austin, Department of Law
Brown Bldg., 708 Colorado,
P.O. Box 1088
Austin, TX 78762-8828

on or before the 28th day of February, 1992, in duly addressed envelopes, with postage prepaid, return receipt requested.

I certify under penalty of perjury that the foregoing is true and correct. Executed on February 28, 1992.



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Attorney for Petitioners: Jon G. Murray
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February 28, 1992

Appendices

Appendix A.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Jon G. MURRAY, and Society of Separationists, Inc.
CIV No. A-87-CA-320

v.

CITY OF AUSTIN, TEXAS,
TRAVIS COUNTY, TEXAS
Attorney General of the State of Texas,

ORDER
Sept. 7, 1990

NOWLIN, District Judge

This cause came before the Court on Plaintiffs' Jon G. Murray and the Society of Separationists, Inc., Original Complaint seeking declaratory and injunctive relief against the City of Austin, Texas, the City Council, its individual members, and the Mayor in their official capacities. Specifically, Plaintiffs seek a declaration that the Defendants' use of the City Seal, which contains a Latin cross, a pair of wings, a lamp, and a silhouette of the State Capitol, violates the First and Fourteenth Amendments of the United States Constitution as well as Article I, Sections six and seven of the Texas Constitution. Plaintiffs also seek a permanent injunction against the Seal's continued use.

Plaintiffs and Defendants have filed cross motions for summary judgment. Rule 56(c) permits the Court to grant a motion for summary judgment when it appears from the affidavits and other exhibits on file with the Court that there is no genuine issue of material fact for trial, and when the movant is entitled to summary judgment as a matter of law. FED.R.CIV.P. 56(c); *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322; 106 S.Ct. 2548, 2552;

91 L.Ed.2d 265 (1986). Since both parties in this case seek summary judgment, both parties agree that there are no material issues of fact in dispute and that this case may be disposed of as a matter of law.

Plaintiffs' and Defendants' cross Motions for Summary Judgment are limited to the issues of whether the Austin City Seal violates the Establishment Clause of the First Amendment of the United States Constitution, and the Free Exercise Clause of the First Amendment of the United States Constitution. The Court will, therefore, limit its opinion to these two issues. The Court will proceed with the Establishment Clause issue first.

I. THE ESTABLISHMENT CLAUSE

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, . . . " This clause has been made applicable to the states, and its political subdivisions, through the Fourteenth Amendment, *See Everson v. Board of Education*, 330 U.S. 421; 67 S.Ct. 504; 91 L.Ed. 711 (1947). In *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573; 109 S.Ct. 3086; 106 L.Ed.2d 472 (1989), the Supreme Court recently confirmed the three part test in *Lemon v. Kurtzman*, 403 U.S. 602; 91 S.Ct. 2105; 29 L.Ed.2d 745 (1971), for determining whether the conduct of a governmental entity complies with the Establishment Clause of the First Amendment.

Under *Lemon*, in order for the challenged governmental conduct to be found constitutional: (1) it must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion. *Id.*, at 612; 91 S.Ct. at 2111. The First Amendment is violated if any of the three prongs of the test are violated. *Allegheny*, 109 S.Ct. at 3100.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *Purpose Test*

The purpose test is based on the subjective intent of the governmental entity charged with the unconstitutional conduct. *See*

Friedman v. Board of County Commissioners of Bernalillo County, 781 F.2d 777, 781 (10th Cir. 1985), *cert. denied*, 476 U.S. 1169; 106 S.Ct. 2890; 90 L.Ed.2d 978 (1986). The City of Austin has submitted to the Court a copy of the resolution contained in the minutes of the Special Meeting of the City Council held on April 12, 1919, in which the city adopted its original city seal, which was based on the modified Coat of Arms of Stephen F. Austin.[1]

The original coat of arms of the Austin family was a crest containing three crosslets, atop of which stood a wreath, supporting a cross between two wings.[2] Plaintiffs acknowledge that the cross on the crest was originally used to indicate that a progenitor had participated in a crusade. The wings were designed to represent St. Austin, also known as St. Augustine, Archbishop of Canterbury.[3]

Stephen F. Austin modified that design by replacing the three crosslets with a deer's head to symbolize that he was an American pioneer.[4] The current city seal is an even further modification of the original Austin coat of arms. The city seal now consists of a shield surmounted by a crest formed by the silhouette of the Texas capitol. Superimposed on the capitol silhouette is the crest of the coat of arms of Stephen F. Austin, without the deer.[5] The crest now includes a wreath, two wings, and cross-crosslet. In a blue triangle field, is a gold lamp of knowledge symbolizing the educational advantages of the city. The City Council adopted a city flag bearing this insignia on April 12, 1919 by a resolution, which has been submitted as an exhibit by Defendants. In the City Council resolution, the Council described the city seal as

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[1]Stephen F. Austin established a colony of settlers in Central Texas by the Mexican Government in 1823, and later served as the Secretary of the State of the Republic of Texas. As a result of his contributions, Stephen F. Austin is known as "the Father of Texas" and the state capitol, the City of Austin, bears his name.

[2]*See* Appendix A.

[3]*Stephen F. Austin's Legacies* at 22, (W. E. Long, ed. (1970)).

[4]Based on documents submitted to the Court from the Austin History Center. *See* Appendix B.

[5]*See* Appendix C.

follows:

> A silhouette of the Capitol in red crowns the whole, and woven into this silhouette is the crest to the coat-of-arms of Stephen F. Austin, after whom the City of Austin was named. The entire design is a modified form of the Austin coat-of-arms. In the center of the blue field is a golden lamp of knowledge, typifying the educational advantages of Austin, its orange color indicating the University of Texas.

Thus, there is documentary evidence that the City Council had a secular purpose in adopting a modified version of the Austin coat of arms as its City seal.[6] The Plaintiffs have submitted no documentary evidence sufficient to contradict the Council's own stated purpose for the use of the coat of arms. Plaintiffs only allege that "it nonetheless may be that the City specifically desired to promote Christianity through the cross in the seal." Speculation is insufficient to support a motion for summary judgment, especially when faced with documentary evidence to the contrary. The Court, thus, finds that the City had the secular purpose of recognizing the coat of arms of Stephen F. Austin in the adoption of its city seal.

B. *Effects Test*

The effects test is an objective one and must be passed separately and apart from the City's actual stated purpose. *Friedman*, 781 F.2d at 781. The issue under the effects test is whether the seal's principal or primary effect is one that advances religion. *Lemon*, 91 S.Ct. at 2111. The Supreme Court recently elucidated this criteria by stating that the issue is whether, "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious

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[6]The fact that Stephen F. Austin's ancestors may have had a religious purpose in the design of the family coat of arms is irrelevant to the city council's secular purpose in adopting and modifying the coat of arms as its city seal.

choices." *Allegheny*, 109 S.Ct. at 3103 (quoting *School District of City of Grand Rapids v. Ball;* 473 U.S. 373; 105 S.Ct. 3216, 3226; 87 L.Ed.2d 267 (1985)). The Supreme Court further stated that the effect of the government's use of religious symbolism depends upon the unique physical context in which it appears. *Id.*

In *Lynch v. Donnelly*, 465 U.S. 668; 104 S.Ct. 1355, 1369; 79 L.Ed.2d 604 (1984), the Supreme Court held that a municipality's display of a nativity scene as part of its annual Christmas display did not violate the Establishment Clause because of the generally secular physical context in which it was displayed. The nativity scene was part of a Christmas display, which included Santa Claus, a reindeer, and a Christmas tree. The Court found that the primary effect was not to benefit any religion, but to celebrate a holiday and depict the origin of that holiday. The concurrence opined that because the nativity scene was displayed along with purely secular symbols, its setting changed what viewers might otherwise understand to be the purpose of the display, and negated any message of endorsement of Christian beliefs represented by the nativity scene. *Id.*, 104 S.Ct. at 1369 (O'Connor, J., concurring).

In contrast, the Supreme Court, in *Allegheny*, held that the city's display of a nativity scene standing alone on the Grand Staircase of the Allegheny County Courthouse, which was the most prominent part of the courthouse, and containing a banner overhead proclaiming, "Gloria in Excelsis Deo," meaning "Glory to God in the highest," had no secular setting to negate the primary effect, which, in the Court's view was to send a message that the county supports and promotes the Christian praise to God. *Allegheny*, 109 S.Ct. at 3104.

In *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985), *cert. denied*, 476 U.S. 1169; 106 S.Ct. 2890; 90 L.Ed.2d 978 (1986), the Tenth Circuit held that the county's use of a seal, which contained a large Latin cross in the center and a Spanish motto, which meant "With This We Conquer" failed the effects test. In *Friedman*, unlike in the instant case, the cross was the only visual element on the seal and was surrounded by rays of light emanating from the cross. The Tenth Circuit distinguished the case before it from *Lynch* by the fact

that the religious symbols in the county seal did not appear in a generally secular context.

In *Harris v. City of Zion*, 729 F.Supp. 1242 (N.D.Ill. 1990), the District Court of the Northern District of Illinois upheld the city of Rolling Meadows' city seal, which contained a Latin cross, on the basis that, in the context of the other symbols in the seal, a water tower, a leaf, and a school, the cross merely represented an aspect of the origin of the Rolling Meadow community. The Court found the remaining symbols sufficiently neutralized the seal to avoid any religious message which a lone or prominent cross might convey. *Id.*, at 1248-49.

The District Court of Northern Illinois, in the above case, also had the opportunity to determine the constitutionality of the City of Zion's city seal, which contained a cross, a dove, a crown with a scepter, and a ribbon with the words, "God Reigns." The Court found that the sum of the individual symbols imparted a decidedly religious message, and that there was nothing secular to neutralize the message. *Id.*, at 1250.

In contrast to the seal in the case of the *City of Zion*, and the seal in the case of *Friedman*, the cross in the seal of the City of Austin, is part of a generally secular context, which includes the lamp of knowledge, the State Capitol, and a pair of wings. In the Court's opinion, the religious aspect of the cross is sufficiently negated by the surrounding secular symbols.[7] Moreover, whatever religious significance the pair of wings in the Austin Family's coat of arms may have once had, the Court is of the opinion that it has long since lost any such significance when viewed by the average modern day observer.[8] The Court finds that, considering the context, the Austin City seal is not sufficiently likely to be

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[7]The Court does not make this determination based on a mathematical calculation of the geometric area occupied by the cross as suggested by Defendants. The Court, however, has taken into consideration the small size of the cross insofar as it is relevant to the issue of its prominence in the context of the surrounding symbols.

[8]*See American Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265, 271-72 (7th Cir. 1986). (considering whether a particular symbol of religious origin has lost its religious significance over time.)

perceived by adherents of Christianity as an endorsement of their religion, or by nonadherents of Christianity as a disapproval of their religious choices.

C. *Excessive Entanglement*

With respect to the excessive entanglement text, the Plaintiffs themselves conceded that "there is no evidence that City of Austin has intruded into the internal affairs of any particular church or religious organization, nor that any organized religion has intruded into the affairs of the City." Plaintiffs merely argue that whenever government supports and endorses a particular religion, it tends to entangle itself in a potentially politically divisive conflict. Plaintiffs continue to attempt to support their case with conjecture and hypothetical situations. The Court has concluded that the City of Austin does not support or endorse any particular religion. Moreover, even if the Court had found otherwise, the burden is on Plaintiffs to prove their case against the City by concrete evidence rather than by hollow assumptions.

It is a waste of this Court's time to entertain such unsupported allegations without the Plaintiffs even attempting to bring forth a scintilla of evidence for the Court's consideration. The Court is not in a position to tolerate such frivolous claims. The Court finds that the seal of the City of Austin does not violate the Establishment Clause of the First Amendment.

III. THE FREE EXERCISE CLAUSE

[3]. The Free Exercise clause of the First Amendment of the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." This clause was made applicable to the states in *Cantwell v. Connecticut*, 310 U.S. 296; 60 S.Ct. 900; 84 L.Ed. 1213 (1940). Plaintiffs have not attempted to demonstrate any coercive effect, or any burden imposed on them, or any type of interference with their religious beliefs or non-beliefs, resulting from the use of the City of Austin's seal. *School District of Abingdon [sic]* Township v. Schempp, 374 U.S. 203, 223; 83 S.Ct. 1560, 1572; 10 L.Ed. 2d 844 (1963). At most, Plaintiffs allege that there is "subtle coercion" on them to adhere to the majoritarian faith symbolized by the cross in the seal. Plain-

tiffs, however, have failed to produce any evidence pointing to a single incident in which any one of their members was coerced in any manner, subtle or otherwise to perform any specific acts against their will.

This alleged "subtle coercion" is a far cry from cases dealing with actual interference with specific religious activities or actual compulsion of acts in violation of one's religious beliefs, which have typically come before the Supreme Court in the past. *See, e.g., Wisconsin v. Yoder,* 406 U.S. 205; 92 S.Ct. 1526; 32 L.Ed.2d 15 (1972) (dealing with compulsory education and the Amish); *Reynolds v. United States,* 98 U.S. 145; 25 L.Ed. 244 (1878) (dealing with polygamy and the Mormon Church); *West Virginia State Board of Education v. Barnette,* 319 U.S. 624; 63 S.Ct. 1178; 87 L.Ed. 1628 (1943) (dealing with compulsory flag salute and Jehovah's Witnesses); *Wooley v. Maynard,* 430 U.S. 705; 97 S.Ct. 1428; 51 L.Ed.2d 752 (1977) (dealing with compelled display of words, "Live Free or Die" on license plate); *Sherbert v. Verner,* 374 U.S. 398; 83 S.Ct. 1790; 10 L.Ed.2d 965 (1963) (compelling work on religious holidays). As such, the Plaintiffs continue to test the Court's patience by bringing conclusory allegations with not one shred of evidence to support them. The Court finds that the seal of the City of Austin does not violate the Free Exercise clause of the First Amendment.

ACCORDINGLY, IT IS ORDERED that the Plaintiffs' Motion for Summary Judgment is DENIED; and that the Defendants' Motion for Summary Judgment is GRANTED. IT IS FURTHER ORDERED, in accordance with Fed.R.Civ P. 11, that Plaintiffs pay Defendants court costs and reasonable attorneys' fees incurred in this litigation. Defendants are granted leave to submit to the Court affidavits in support of costs and reasonable attorney's fees. IT IS FURTHER ORDERED that Plaintiffs' cause of action alleging violations of the Texas Constitution is DISMISSED as frivolous; and for lack of subject matter jurisdiction due to the disposition of the only issues invoking the Court's federal question jurisdiction

SIGNED AND ENTERED, this, the 7th day of September, 1990.

APPENDIX A



THE AUSTIN COAT OF ARMS (Used by Elijah Austin, 1775)
Motto: Deus Regnat — Argent, on a fesse between two chevrons sable three cross-crosslets of the first, within a bordure [*sic*] of the same charged with a wreath of laurel and roses proper.
Crest — a cross or between wings *argent*.
Complete American Armoury and Blue book. Mathews
Checked by Mrs. J. B. Golden, Genealogy Librarian, Texas State Library.
Approved by Mrs. John S. Caldwell, Sr., Great-granddaughter of Emily Margaret Austin; J. P. Bryan, Great-great-grandson of Emily Margaret Austin; Miss Corinne Perry, Great-granddaughter of Emily Margaret Austin; and previously approved by her Aunt, Mrs. Hally Bryan Perry.

APPENDIX B



S — SILVER
B — BLACK
G — GOLD

Coat of arms and crest of Stephen F. Austin, as well as the committee could determine.

APPENDIX C



Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8561

JON G. MURRAY, and Society of Separationists, Inc. Plaintiff-Appellants

v.

CITY OF AUSTIN, TEXAS and Travis County, Texas, Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas

November 4, 1991

Before GOLDBERG, SMITH, and BARKSDALE, Circuit Judges.

BARKSDALE, Circuit Judge:

Today, we address an issue grounded in part of the bedrock on which our Country stands — freedom of religion. The issue springs from the inclusion of a Christian cross in the insignia of the City of Austin, Texas. The cross found its way into the insignia because it was part of the coat of arms of the person for whom the City is named, Stephen F. Austin, the "father of Texas".

Jon Murray and the Society of Separationists, of which he is a member, sued the City, among others, claiming that the insignia violates the Establishment and Free Exercise Clauses of the

First Amendment (as incorporated by the Fourteenth Amendment), because it contains the cross, among other symbols. Agreeing that there are no disputed issues of material fact, the parties filed cross-motions for summary judgment. The district court granted summary judgment for the City and *sua sponte* imposed Rule 11 sanctions against Murray and the Society. 744 F.Supp. 771 (W.D.Tex. 1990).[1] We AFFIRM the summary judgment, but VACATE the award of sanctions.[2]

I.

In 1916, the Austin City Council sought proposed designs for a municipal flag and chose a design that incorporated, with some modifications, the family coat of arms of Stephen F. Austin, the "father of Texas" and the person after whom the City is named. The original Austin family coat of arms was a crest with three cross-crosslets and a wreath, supporting a Latin cross between two wings. (A Latin cross is the symbol of the Christian religion; its three upper arms are shorter than the lower arm, while a crosslet is "a small cross; *esp:* one used as a heraldic bearing". Websters New Collegiate Dictionary 308-09, illustrations 1 and 18 (9th ed. 1989). A cross-crosslet is defined as "*heraldry:* a cross with a crossbar near the end of each arm". Websters New International Dictionary 541 (3d ed. 1986).) The Latin cross in the coat of arms signified that a progenitor had participated in a crusade; and the wings represented St. Austin (also known as St. Augustine), the Archbishop of Canterbury. (*See* Appendix 1.) Stephen F. Austin modified the original coat of arms by replacing the three

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[1]Plaintiffs also claimed that the insignia violated the Texas Bill of Rights of the Texas Constitution, article I, sections 6 and 7, which respectively provide for freedom of worship and prohibit appropriations for sectarian purposes. After disposing of the federal claims, the district court dismissed these state law claims on the bases that they were frivolous and pendent (now "supplemental"; see 28 U.S.C. § 1367). 744 F.Supp. at 776. Appellants do not raise them on appeal.

[2]*See* Fed.R.Civ.P. 56. It is more than well established that our review of a summary judgment is plenary. *E.g., Fields v. City of South Houston*, 922 F.2d 1183, 1187 (5th Cir. 1991).

cross-crosslets with a deer's head to symbolize that he was an American pioneer. He also changed the Latin cross atop the crest into a form of cross-crosslet: a Latin cross with crosslets on only the three upper arms. (*See* Appendix 2.)

For its insignia, the City has used an adaptation of Stephen F. Austin's coat of arms. The insignia is a circle with "CITY OF AUSTIN" written circumferentially across the top and "FOUNDED 1839" across the bottom. Inside the circle is a shield formed by three vertical stripes, with an inverted triangle at the top of the shield. Inside the triangle is a lamp of knowledge, representing "the educational advantages of the City." (For example, the University of Texas is located at Austin.) Atop the shield is the silhouette of the State capitol, superimposed on the capitol is the Latin cross with crosslets on the three upper arms, surrounded by a pair of wings. (*See* Appendix 3.) The insignia is used on police cars and other city vehicles, letterhead, monthly utility bills, uniforms of city employees, including police and firefighters, on the wall of the city council chambers, and on or in many city-owned buildings, parks, and recreation centers. (*See* Appendix 4.)

Murray's summary judgment affidavit stated, among other things: that he lives and works in Austin, receives many items of correspondence from the City and uses its public services, including police and fire protection and water, electric, garbage, and utility services; that he has visited the chambers of the Austin City Council and the City's municipal building; that the Christian cross in the insignia is used only by the Roman Catholic denomination; that the fact that his city uses "such a religious symbol truly offends" him; that he does "not subscribe to the religion symbolized nor to the particular sect of that religion which is further symbolized"; that he personally confronts the insignia in "many locations around the City," including the monthly utility bills he receives at his home and at the Society's offices; that use of the insignia by the City is an endorsement of Christianity in general and the Roman Catholic faith in particular; that "only after research into the seal[3] and the cross did [he] become aware

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[3]The parties use the terms seal and insignia interchangeably; however, the seal of Austin is a star.

that the cross was part of Stephen F. Austin's coat-of-arms"; that he has "experienced police hostility in the past when police protection was needed"; that he fears that this may have been because of the City's association with Christianity and his status as a "well known atheist spokesperson"; and that he is also "distressed that some portion of [his] City tax contribution or . . . utility payments goes to advertising religion."

II.

At issue is whether the insignia violates the Establishment and Free Exercise Clauses of the First Amendment, which provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. Amend. I. As noted, the cross depicted in the insignia is a Latin cross with three crosslets, which Murray states is used particularly by the Roman Catholic faith. However, the challenge is not to a particular denomination being represented. Instead, Murray relies on what he perceives as the representation of Christianity. And, he asserts that although the cross does not occupy much space in the insignia, it is a prominent part of it; that because of its color and location, as well as its being surrounded by a pair of wings, "[a]ll attention is drawn to" it.

The resolution in 1916 soliciting designs for the City's flag makes no mention of the cross or Christianity, instead solicits designs of "artistic merit" expressing "some salient characteristics of the city", and suggest as possibilities use of

> [t]he natural beauty of Austin, the City of the Violet Crown, the lake and dam, the Capital of the State, the dome of the Capitol, the seal of the city, and educational center, its industries, the sentiment of its past history, the derivation of the name — from Stephen F. Austin, an expression of the ideals of Stephen F. Austin in symbolic form, the use of the coat of arms of Stephen F. Austin.

Nor is there any reference to the cross in the resolution in 1919 adopting the design. The resolution describes the emblem as a shield with a silhouette of the Capitol crowning the whole

> and woven into this silhouette is the crest to the coat-of-arms of Stephen F. Austin, after whom the City of Austin was named. The entire design is a modified form of the Austin coat-of-arms. In the center . . . is a golden lamp of knowledge, typifying the educational advantages of Austin. . . .

Although the cross is included in the insignia because it was part of Stephen F. Austin's coat of arms, it is a Christian cross nonetheless. While the reason for its being in the insignia is one of the factors we consider, we cannot avoid reaching the First Amendment issue simply because the cross was not placed in the insignia for religious purposes. It was in the original coat of arms to denote that an ancestor had participated in a crusade. But of far more significance, anyone seeing the insignia sees a Christian cross. We cannot expect persons viewing it to have researched its origin beforehand, any more than we can expect the City to include a disclaimer with it.

A.

As a threshold issue, we must, of course, be satisfied that Murray and the Society have standing to challenge the insignia.[4] To establish standing under Article III of the United States Constitution, a litigant must demonstrate:

> [1] that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . .
> [2] that the injury "fairly can be traced to the challenged action" and
> [3] [that the injury] "is likely to be redressed by a favorable

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[4]We raised this issue *sua sponte* at oral argument. At that time, the City contested standing — apparently for the first time — but requested that we assume standing and rule on the merits. However, after argument, when both sides filed briefs on standing, the City contested it.

decision."

Cramer v. Skinner, 931 F.2d 1020, 1024 (5th Cir. 1991) (brackets in *Cramer*) (quoting *Valley Force Christian College v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464, 472; 102 S.Ct. 752, 758; 70 L.Ed.2d 700 (1982)), *cert. denied*, — U.S. —; 112 S.Ct. 298; — L.Ed.2d — (1991). And in so deciding, "a court should consider three prudential concerns":

> 1) whether the plaintiff's complaint falls within the zone of interests protected by the statute or constitutional provision at issue;
> 2) whether the complaint raises abstract questions amounting to generalized grievances which are more appropriately resolved by the legislative branches; and
> 3) whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties.

Cramer, 931 F.2d at 1024-25 (citations omitted).

Murray asserts that his earlier described affidavit establishes that he and the Society have standing under general standing principles and that he has standing as a municipal citizen and taxpayer. Concerning the former, see, e.g., *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989) ("allegations of direct, personal contact [with municipal logo] suffices as non-economic injury"), *cert. denied*, — U.S. —; 110 S.Ct. 1937; 109 L.Ed.2d 300 (1990); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692-93 (11th Cir. 1987) (receipt of city correspondence and proclamation bearing challenged seal sufficient to confer standing); *compare Harris v. City of Zion*, 927 F.2d 1401, 1405 (7th Cir. 1991) (use of city seal on automobile tax stickers and garbage bags which plaintiffs were required to use *and* plaintiffs' *altering* their travel routes to avoid viewing seal painted on city water tower sufficient to confer standing), *petitions for cert. filed*, (U.S. July 19, 1991) (No. 91-141) and U.S. Aug. 19, 1991) (No. 91-299).

Although "the concept of injury for standing purposes is particularly elusive in Establishment Clause cases," *Saladin*, 812 F.2d

at 691 (citation omitted), Murray has alleged sufficient injury to confer standing. In so ruling, we attach considerable weight to the fact that standing has not been an issue in the Supreme Court in similar cases, such as *Lynch v. Donnelly*, 465 U.S. 668; 104 S.Ct. 1355; 79 L.Ed.2d 604 (1984) (plaintiffs were the American Civil Liberties Union and residents of the community in which the crèche in issue was displayed in a private park, who were also members of the ACLU) and *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573; 109 S.Ct. 3086; 106 L.Ed.2d 472 (1989) (plaintiffs were the ACLU and several residents of a community where a crèche and a menorah were displayed in the County Courthouse and just outside the City-County Building respectively). *Compare Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485-87; 102 S.Ct. 752, 765-67; 70 L.Ed.2d 700 (1982) (where plaintiffs learned of challenged conduct through the media and did not live in or near the alleged offending state, the Court held no standing for federal taxpayer grievance nor for "psychological consequence presumably produced by observation of conduct with which one disagrees").[5] And, because Murray has standing, the Society, of which he is a member, also has standing. *Warth v. Seldin*, 422 U.S. 490, 511, 515; 95 S.Ct. 2197, 2211, 2213; 45 L.Ed.2d 343 (1975); *Harris v. City of Zion*, 927 F.2d at 1401, 1405.

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[5]Accordingly, we need not address his alternative assertion of standing, based upon his being a municipal taxpayer. *See, e.g., Valley Forge*, 454 U.S. at 482-83; 102 S.Ct. at 764-65; *Doremus v. Board of Educ.*, 342 U.S. 429, 434; 72 S.Ct. 394, 397; 96 L.Ed. 75 (1952). And, although Murray alleges sufficient injury to confer standing to challenge the insignia as violative of the Establishment Clause, he arguably lacks standing to assert his Free Exercise claim. Murray fails to allege a substantial or significant burden on the exercise of his religion (nonreligion). *See* part II.B.1 *infra* and Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L.Rev. 268, 300 (1987) (noting that generally under the Free Exercise Clause, a plaintiff must show a "substantial" or "severe" burden on the exercise of his or her religion, but suggesting that under the "endorsement" test, discussed *infra*, all that may be required is an assertion that one "feels like an 'outsider' ").

B.

We quickly dispose of the Free Exercise Clause and sanctions issues.

1.

The free exercise claim is based on Murray's assertions that "[t]here is at least subtle coercion for the Plaintiffs to adhere to the majoritarian faith symbolized by the cross in the seal" and that Austin residents are "forced to support an official municipal seal bearing the cross." However, this contention reaches well beyond the purview of the Free Exercise Clause.

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

Employment Div., Dep't. of Human Resources v. Smith, 494 U.S. 872, —; 110 S.Ct. 1595, 1599; 108 L.Ed.2d 876 (1990) (emphasis and citations omitted). None of these concerns are implicated. Murray fails to articulate a sufficient burden or restriction imposed on the free exercise of his religion (or non-religious beliefs) or to offer any authority in support of his "subtle coercion" argument.[6]

We agree with the district court that Murray's claim is a "far cry from cases dealing with actual interference . . . or actual compulsion" which have presented viable Free Exercise claims. 744

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[6]Indeed, Murray concedes that he could find no case law to support his argument.

F.Supp. at 775; *see, e.g., Wooley v. Maynard*, 430 U.S. 705; 97 S.Ct. 1428; 51 L.Ed.2d 752 (1977) (invalidating compelled display of "Live Free or Die" on license plate); *Wisconsin v. Yoder*, 406 U.S. 205; 92 S.Ct. 1526; 32 L.Ed.2d 15 (1972) (invalidating law requiring compulsory school attendance); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624; 63 S.Ct. 1178; 87 L.Ed. 1628 (1943) (invalidating compulsory flag salute). His argument is without merit.

2.

Equally unavailing is the City's attempt to justify the sanctions. In *sua sponte* imposing them under Fed.R.Civ.P. 11, the district judge stated that Murray had failed to present any evidence in support of his excessive entanglement and free exercise claims.[7] We review the imposition of Rule 11 sanctions under the abuse of discretion standard. *Thomas v. Capital Security Servs., Inc.*, 836 F.2d 866, 872 (5th Cir. 1988) (en banc).

The City devoted one paragraph in its brief to this issue and cited no authority for sanctions.[8] Moreover, in requesting oral arguments before this court, the City stated that the issues presented "have not been addressed by this [c]ourt or authoritatively decided by the United States Supreme Court [and] . . . are of an important and consequential nature. . . ." Although we agree with the district court that Murray's claims are unavailing, we conclude that his contentions do not violate Rule 11, which provides for sanctions if a claim is not "well grounded in fact and is [not] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Murray's

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[7]The excessive entanglement claim was made under the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602; 91 S.Ct. 2105; 29 L.Ed.2d 745 (1971). This claim is not raised on appeal. See *infra*.

[8]The City cited only *Thomas*, 836 F.2d at 866 (providing the appropriate standard of review for Rule 11 sanctions and other general guidance, but offering no support for the imposition of sanctions in this context).

claims are, at the very least, protected by the "good faith argument" provision in Rule 11, especially for this sensitive area. *See infra.* They do not fail Rule 11's standards.[9]

C.

The critical issue is whether the insignia can withstand Establishment Clause challenge. As with most Establishment Clause cases, our review "is a delicate task." *County of Allegheny,* 492 U.S. at 623; 109 S.Ct. at 3117 (O'Connor, J., concurring in part and in the judgment). The exceedingly great flexibility that must be applied in such review is well-stated in *Lynch,* 465 U.S. at 678-79; 104 S.Ct. at 1361-62 (citations omitted):

> In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

Murray asserts violation of the Establishment Clause pursuant to the *Lemon* test. In order to pass constitutional muster under it, a statute or other governmental practice (1) "must have a secular legislative purpose; . . . [2] its principal or primary effect must be one that neither advances nor inhibits religion; . . . [and (3) it] must not foster 'an excessive government entanglement with religion.'" *Lemon,* 403 U.S. at 612-13; 91 S.Ct. at 2111-12 (citations

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[9]Moreover, although the City does not argue any alternative bases for affirming the imposition of sanctions, we have carefully reviewed the record and find none.

omitted) (emphasis added). On appeal, Murray relies solely on part two of the test, the "effects" prong, conceding that the City did not have an inappropriate purpose in using the insignia and that its use does not involve excessive entanglement between government and religion. *Lemon* was decided in 1971. More recent cases, such as *Marsh v. Chambers*, 463 U.S. 783; 103 S.Ct. 3330; 77 L.Ed.2d 1019 (1983), *Lynch* (1984) and the most recent pronouncement, *County of Allegheny* (1989), are attempts to explain or clarify, if not find a better approach than, *Lemon*. *See, e.g.*, the opinion for the Court in *Lynch*, 465 U.S. at 679; 104 S.Ct. at 1362.

> In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. *Lemon, supra.* But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 677-678 [91 S.Ct. 2091, 2095-96; 29 L.Ed.2d 790] (1971); [*Committee for Public Education and Religious Liberty v.*] *Nyquist*, 413 U.S. [756], 773 [93 S.Ct. 2955, 2965; 37 L.Ed.2d 948] [(1973)]. In two cases, the Court did not even apply the *Lemon* "test." We did not, for example, consider that analysis relevant in *Marsh*. . . . Nor did we find *Lemon* useful in *Larson v. Valente*, 456 U.S. 228 [102 S.Ct. 1673; 72 L.Ed.2d 33] (1982), where there was substantial evidence of overt discrimination against a particular church.

See, e.g., Jones v. Clear Creek Independent School Dist., 930 F.2d 416, 419 (5th Cir. 1991) (*Lemon* was proper test to apply when determining constitutionality of school district resolution allowing student volunteers to present nonsectarian nonproselytizing graduation prayers), *petition for cert. filed*, (U.S. Aug. 20, 1991) (No. 91-310); and *Jones*, 930 F.2d at 424 (Garwood, J., concurring) (agreeing that *Lemon* test, "the challenged policy's highest hurdle", was met, but declining to decide whether "some less re-

strictive or rigid test might be more properly applied").

The judgment in *Lynch* resulted from the concurring opinion by Justice O'Connor, in which she stated that "'[f]ocusing on institutional entanglement and on *endorsement* or disapproval of religion clarifies the *Lemon* test as an analytical device." 465 U.S. at 689; 104 S.Ct. at 1367 (emphasis added). The Supreme Court was far more divided, indeed fractured, in *County of Allegheny*, in which the endorsement test employed by some of the Justices was rivaled by a coercion test espoused by four: "Non-coercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage." 492 U.S. at 662-63; 109 S.Ct. at 3137-38 (Kennedy, J., concurring in the judgment in part and dissenting in part). We need not discuss further the differing views advanced in *County of Allegheny*. Suffice it to say that there is no one readily and easily applicable test. Perhaps, because of the sensitivity of this area, this is as it should be. And, it may well be that *Lynch*, including as discussed below, provides all the guidance that is necessary, at least for this case. However, as further discussed below, this wish is belied by the sharply divided Court in *County of Allegheny*. Accordingly, for this case, not only must we attempt to apply *Lemon*, but we must look to *Lynch*, *Marsh*, and *County of Allegheny* as well.

The *Lemon* "effects" prong asks whether the insignia's principal or primary effect advances or inhibits religion; if it does, it violates the First Amendment. But, one of the difficulties in applying *Lemon*, especially in a non-statutory context as is present here, is knowing the proper scope or reach of "principal or primary effect". If we focus exclusively on the inclusion of the religious symbol, display, or practice, then every use of religious symbolism — and prayer — would fail. The plain wording of the First Amendment does not require this; nor does the Supreme Court. For example, as discussed in *Lynch*, 465 U.S. at 676-77; 104 S.Ct. at 1360-61:

> Art galleries supported by public revenues display reli-

> gious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages. The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent — not seasonal — symbol of religion: Moses with the Ten Commandments.

In addition, much more direct, as well as permanent, government use of religious acknowledgment, if not religious belief, is allowed: e.g., "In God We Trust" printed on United States Currency; opening court sessions with "God save the United States and this honorable court"; the pledge of allegiance; and legislative prayers. *E.g., Lynch*, 465 U.S. at 674-78; 104 S.Ct. at 1359-62; *Jones v. Clear Creek Independent School Dist.*, 930 F.2d at 421. Indeed, the Supreme Court has rejected focusing exclusively on the religious component of a challenged action. *E.g., Lynch*, 465 U.S. at 678; 104 S.Ct. at 1362.

Conversely, if we need ask only if the City's insignia, as a whole, has the principal or primary effect of advancing or inhibiting religion, the answer must be no. Taken as a whole, the insignia has the principal or primary effect of identifying city activity and property and promoting Austin's unique role and history. But, appellants contend that the use of a Christian cross by the City in its insignia represents a more compelling challenge than the approved activities described above, such as nonsectarian prayer (even though, at a minimum prayer, implicates preference for religion over nonreligion), including the fact that it is permanent, as opposed to seasonal. Consistent with the contention, and "[h]owever history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." *County of Allegheny*, 492 U.S. at 602; 109 S.Ct. at 3105.

Simply put, we do not find that Austin's insignia demonstrates a preference for Christianity. To the extent that the Establishment Clause prevents preferences for one religion over another, it likewise prevents preferences for religion over nonreligion. The crèche (a Christian symbol) in *Lynch*, the menorah (a Jewish symbol) in *County of Allegheny*, the legislative prayer in *Marsh*, and the above-discussed references by government to God have been held not to transgress the Establishment Clause. We view any perceived preference by use of the insignia to be even more remote than in the above-referenced cases.

In *Marsh*, the Court upheld the Nebraska Legislature's practice of opening each session with a prayer by a state-employed clergyman, based on both the practice's unique history and the lack of any evidence tending to show that "the prayer opportunity [was] exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S. at 794-95; 103 S.Ct. at 3337-38. The Court stated:

> Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress — their actions reveal their intent.

Id. at 790, 103 S.Ct. at 3335. The Court elaborated on the "weight to be accorded to history," citing *Walz v. Tax Comm'n*, 397 U.S. 664; 90 S.Ct. 1409; 25 L.Ed.2d 697 (1970):

> "It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside."

Marsh, 463 U.S. at 790; 103 S.Ct. at 3335 (quoting *Walz*, 397 U.S.

at 678; 90 S. Ct. at 1416). Because of the practice's history and the want of any evidence of an intent "to proselytize or advance any one, or to disparage any other, faith or belief," the *Marsh* Court concluded that the legislative prayer presented "no real threat" of an establishment of religion. *Id.* 463 U.S. at 794-95; 103 S.Ct. at 3337-38; *see also id.* at 792; 103 S.Ct. at 3336.

Admittedly, we lack the kind of evidence of original intent present in *Marsh*. Yet this case does share some important similarities with *Marsh:* a long-standing unique history, absolutely no evidence of an intent to proselytize, or advance, any religion, and no threat of an establishment of religion. As stated in Lynch, 465 U.S. at 686; 104 S.Ct. at 1366: "Any notion that [this] symbol[] pose[s] a real danger of establishment of a state church is far-fetched indeed."

In *County of Allegheny*, the Court upheld the display of a menorah during the holiday season. It was placed outside the City-County building, next to a Christmas tree, and accompanied by a sign entitled "Salute to Liberty." The Court found the display did not have "the effect of promoting or endorsing religious beliefs" in its "particular physical setting." 492 U.S. at 621; 109 S.Ct. at 3115. By contrast, a closely divided Court held that the contemporaneous display of a crèche in the County Courthouse did have an impermissible effect. *Id.*[10] The Court was influenced heavily by the absence of anything to detract from the crèche's religious message and its placement in the "main" and "most beautiful part of the building." *Id.* at 579; 109 S.Ct. at 3093.

The effect of the displays was analyzed under the earlier referenced endorsement test urged by Justice O'Connor in her concurrence in *Lynch*. Specifically,

> [t]he effect of a display [or use of religious symbolism] depends upon the message that the government's practice communicates: the question is "what viewers may fairly un-

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[10]Justice Kennedy, joined by Chief Justice Rehnquist, and Justices White and Scalia would have upheld the display of the crèche. 492 U.S. at 655; 109 S.Ct. at 3134 (Kennedy, J., concurring and dissenting in part).

> derstand to be the purpose of the display." That inquiry, of necessity, turns upon the context in which the contested object appears. . . . Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion.

County of Allegheny, 492 U.S. at 595; 109 S.Ct. at 3102 (brackets in *County of Allegheny*) (citations omitted). To be considered is whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Id.* at 597; 109 S.Ct. at 3103 (quoting *School District of Grand Rapids v. Ball*, 473 U.S. 373, 390; 105 S.C.t 3216, 3226; 87 L.Ed.2d 267 (1985)). The greatly differing views in *County of Allegheny* notwithstanding, it appears that "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *Id.* "Under the endorsement test, the 'history and ubiquity' of a practice is relevant . . . because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *County of Allegheny*, 492 U.S. at 630; 109 S.Ct. at 3120 (O'Connor, J., concurring in part and in the judgment).

In light of the guiding Supreme Court case law, and giving special consideration to the endorsement test used in *County of Allegheny*, we decline to hold that any time a municipality incorporates a religious symbol within its seal, insignia, or logo — regardless of the history, purpose, or context — the Establishment Clause is violated. To do so is inappropriate in the difficult area of Establishment Clause analysis dominated by subtle nuances, and it accords too little deference to both our nation's religious and cultural heritage and practices and the Supreme Court guidance. In holding that Austin's insignia does not violate the First Amendment, we recognize that two of our sister circuits have found establishment clause violations when municipal seals included religious symbolism. We do not view this as a split with our

circuit. Instead, it is further evidence, as discussed in *Lynch* for example, that such cases must be decided on their facts.

In the most recent of the two cases, decided after *County of Allegheny*, the Seventh Circuit addressed challenges to the seals for the cities of Zion and Rolling Meadows, Illinois. *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), *petitions for cert. filed*, (U.S. July 19, 1991) (No. 91-141) and (U.S. Aug. 19, 1991) (No. 91-299). Zion's seal depicted a shield containing a cross, a dove, a crown, a scepter, and a banner across the top of the shield proclaiming "God Reigns". *Id.* at 1417 (appendix containing seal). Rolling Meadows' contained a cross in front of a one-story building, a water tower, two industrial buildings, and a leaf. *Id.* at 1403-04, 1416 (appendix containing seal). The Seventh Circuit recognized that the context of the displays was crucial, but nevertheless found that the seals could not be saved by other secular symbols and concluded that the "sectarian religious imagery simply [had] no place on municipal seals." *Id.* at 1402.

We may quickly dispense with any comparison between the insignia for Zion and Austin. Zion's contained only sectarian symbols and was adopted for an express religious purpose. *Id.* at 1403-04. There are also obvious distinctions between those for Rolling Meadows and Austin. For example, the size and placement of the cross in the Rolling Meadows' seal arguably conveys a message of its being a "Christian community." In fact, the one-story, industrial-appearing building depicted behind the cross in that seal is a depiction of a church that was being constructed when the proposed seal was adopted in 1960. 927 F.2d at 1403, 1416 (appendix containing seal). The cross is as tall as the water tower and taller than the building behind it. *Id.* at 1416 (appendix containing seal). The court concluded that "[t]he images on the seal [were] not neutral snapshots of the community; [but rather] they [were] charged with endorsement." *Id.* at 1412. This endorsement caused the seal to fail. *Id.*at 1413. However, we do not read *Harris* to hold that any use of a cross in a seal would cause the same result. *Id.*

In the second case, rendered prior to *County of Allegheny*, the Tenth Circuit addressed an Establishment Clause challenge to a municipal seal in *Friedman v. Board of County Comm'rs of Ber-*

nalillo, 781 F.2d 777 (10th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1169; 106 S.Ct. 2890; 90 L. Ed.2d 978 (1986). In *Friedman*, the seal contained the Spanish motto "Con Esta Vencemos" ("With This We Conquer" or "With This We Overcome") over a Latin cross, highlighted by edging and rays of light. The cross is above mountains and a plain, with eight sheep standing on the plain. *Id.* at 779, 783 (appendix containing seal). Whether the sheep represented a Christian symbol or the county's sheep-raising industry was disputed. *Id.* at 779. The cross was approximately half the length of the seal, making it, for example, approximately one foot tall when appearing on county vehicles. *Id.* at 779 & n. 1.[11] There was no record of either when the county adopted the seal or its purpose in doing so, but there was evidence that it was used intermittently in 1925, again in 1945 to 1956, and in 1973, when the county expanded the use of the seal by placing it on documents, stationery, motor vehicles, and sheriff's officers' uniforms. *Id.* at 779.

The Tenth Circuit concluded that the cross was not neutralized by its context, because the cross was "the only visual element on the seal [and] is surrounded by rays of light. . . . The motto may be fairly regarded as promoting the religion the cross represents. Indeed, that religion seems to be embraced as the instrument by which the county 'conquers.' " *Id.* at 782. As stated, we do not view our decision as conflicting with *Friedman*. Several distinguishing factors in the *Friedman* seal are readily apparent, most importantly: the lack of undisputed secular symbols within the seal; the accompanying phrase which translates "With This We Conquer"; the county's relatively recent expanded use of the seal; and that at least one county commissioner knew at that time that the cross represented the role of the Catholic Church in the settlement of the southwest. *Id.* at 779.

Of interest is the reference to *Friedman* by Justice Kennedy in his concurrence and dissent in *County of Allegheny:*

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[11]In contrast, the cross in Austin's insignia occupies a displacement area of only .4%—.12%. [sic]

> But coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the [Establishment] Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is *per se* suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion. Cf. *Friedman v. Board of County Comm'rs of Bernalillo County*, 781 F.2d 777 (CA10 1985) (en banc) (Latin cross on official county seal); *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (CA11 1983) (cross erected in public park); *Lowe v. Eugene*, 254 Or. 518; 463 P.2d 360 (1969) (same) . . . .

492 U.S. at 661; 109 S.Ct. at 3137 (footnote omitted). But, needless to say, our case is not an extreme one. To the contrary, in considering the Establishment Clause challenge to Austin's insignia, we must recognize the reason for the cross originally being in the coat of arms; that Austin did not have an improper purpose in adopting the insignia; its long and unchallenged use; its non-proselytizing effect; that in its context, it does not endorse religion in any true or meaningful sense of the word "endorsement"; and that requiring the City to remove all displays of the insignia, arguably evinces not neutrality, but instead hostility, to religion.

In sum, we hold that the insignia passes constitutional muster, whether under *Lemon*, because its principal or primary effect is not one that either advances or inhibits religion, or under the Supreme Court's more recent pronouncements, including *Marsh*, *Lynch*, and *County of Allegheny*. In so holding, we obviously cannot fashion a bright line test to apply in future challenges to government use or depiction of religious symbols. Instead, as we must, we decide only the case before us. And in doing so, we have considered, and balanced, the totality of its unique facts and circumstances. In the oft-quoted words of Justice Goldberg, "the

measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 308; 83 S.Ct. 1560, 1616; 10 L.Ed.2d 844 (1963) (Goldberg, J., concurring). Today, we glimpse only that mere shadow, one created by the sustaining, indeed ever-increasing, brilliance of the First Amendment.

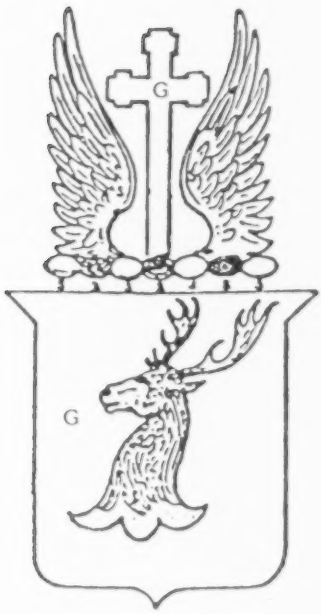
III

For the foregoing reasons, we VACATE the imposition of sanctions, and AFFIRM in all other respects.

APPENDIX 1



APPENDIX 2



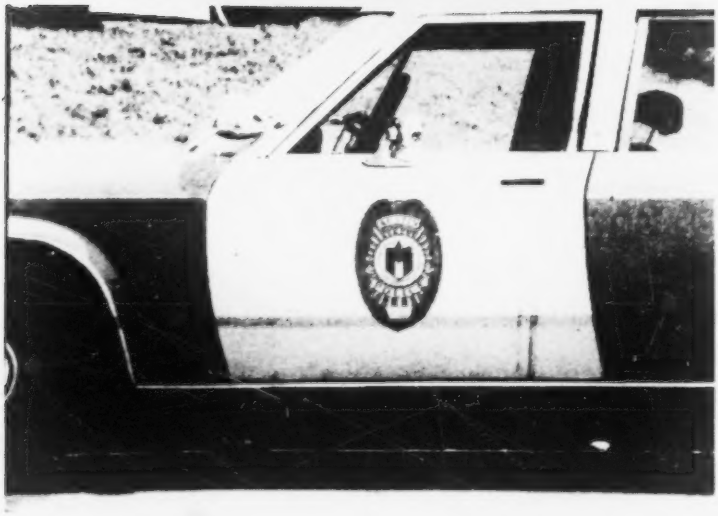
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B — BLACK
G — GOLD

APPENDIX 3

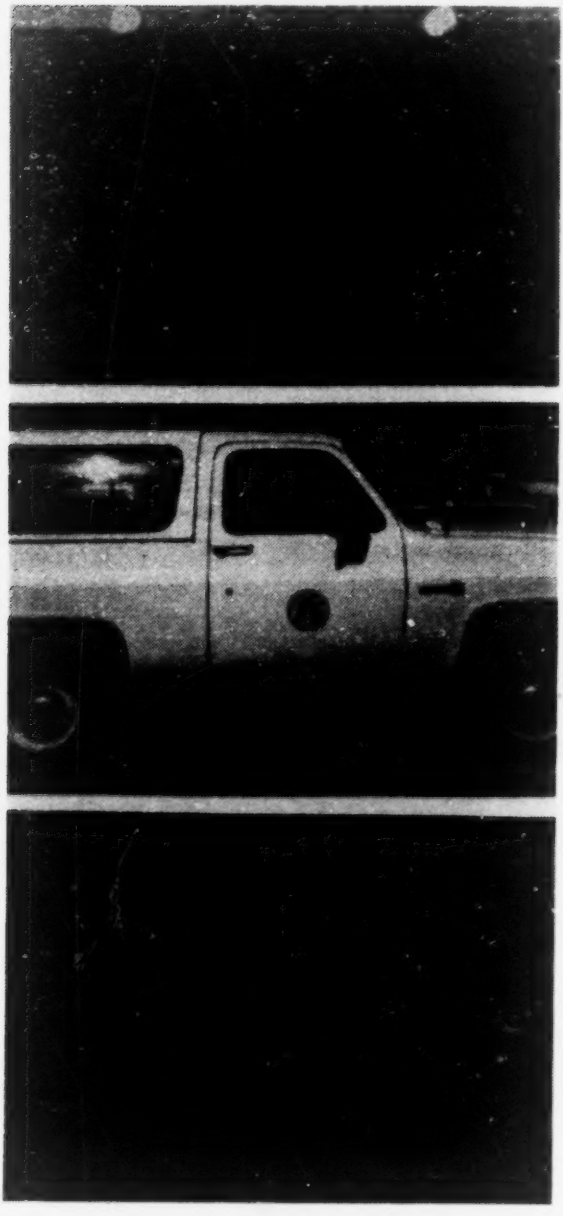


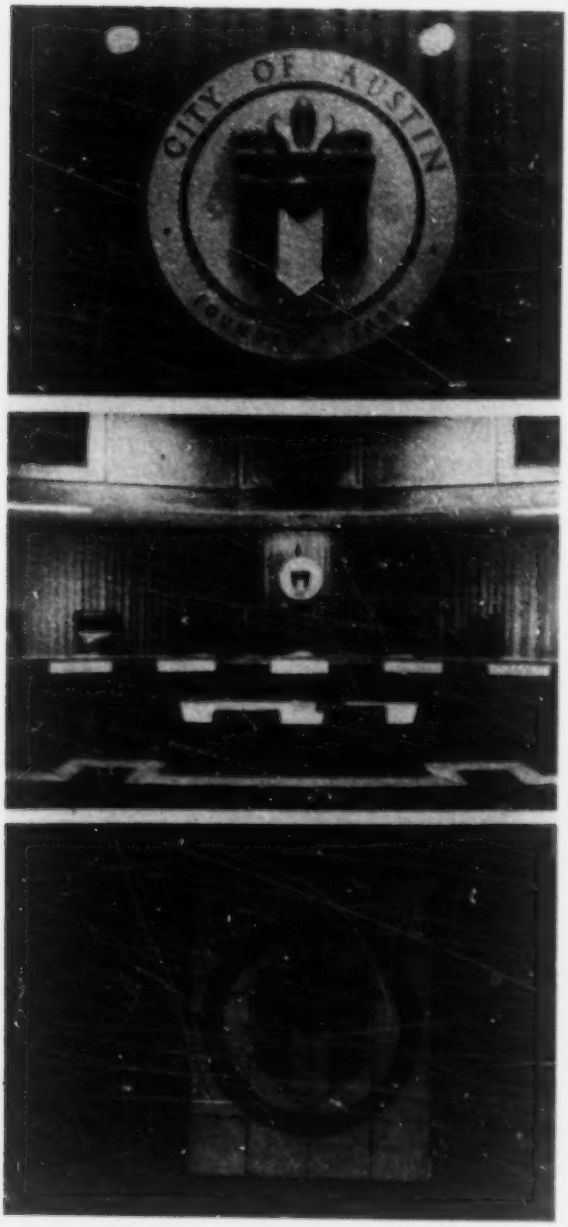
APPENDIX 4





APPENDIX 4 — Continued




CITY OF AUSTIN



City of Austin

Founded by Congress, Republic of Texas, 1839
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GOLDBERG, Circuit Judge, dissenting:

They say hard cases make bad law — this is a hard case. The Austin insignia has existed without protest for the better part of this century. No one alleges that Austin is poised to establish a church of its own or that it is intentionally injecting religion into the mainstream of city life. But that some can glean no glaring harm from the inclusion of a Christian cross on the city's insignia makes its appearance there no less binding on the constitutional spectrophotometer. The threat that lurks is no shadow. The Austin insignia presents as real a danger to the Establishment Clause as did the crèche in *Allegheny*, the seals in *Harris* and *Friedman*, and the crosses in *St. Charles*, *Mendelson*, and *Rabun*. I respectfully dissent.

I.

Anyone reading Establishment Clause precedent — the cases on non-purposeful, symbolic government support for religion — cannot help but be struck by the confusion that reigns in this area. The leading case, the Supreme Court's recent decision on crèches, menorahs, and other Christmastime displays, *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573; 109 S.Ct. 3086; 106 L.Ed.2d 472 (1989), is a confusing matrix composed largely of minority opinions that reach contradictory results and focus on the minutiae of scenic design and physical arrangement. *See generally The Supreme Court — Leading Cases*, 103 Harv.L.Rev. 137, 228-39 (1989). Forthright commentators and jurists (Justice Kennedy and Judge Easterbrook come to mind) have justifiably criticized the arbitrary and inconsistent line-drawing sometimes required by *Allegheny* and other cases.

Nonetheless, it would be a mistake to suppose that all lines drawn in this area are equally arbitrary or that confusion is the order of the day whenever an Establishment Clause issue arises. On the contrary, areas of stable consensus have emerged. For example, judicial approval has been consistent for such secularized and time-worn phrase practices as the coining of money with the phrase "In God We Trust" and the opening of legislative and judicial sessions with prayer or other invocations of the Deity.

Although some argue that these practices are incompatible even with recent Establishment Clause jurisprudence, the margin of approval has remained quite wide.

Equally constant has been judicial disapproval of government use of Christian crosses and, independently, of religious imagery of any sort on municipal seals. No federal court has sustained government use of a cross in any context or any form of religious symbolism appearing on a municipal seal. The Supreme Court itself has repeatedly disapproved in dicta the governmental display of crosses, and at least three Justices have expressed apparent approval of one of the circuit cases, which held that a cross within the seal violated the Establishment Clause. *See Allegheny*, 109 S.Ct. at 3120 (O'Connor, J., joined by Brennan and Stevens, JJ., concurring in part and in the judgment) (citing *Friedman v. Board of County Commrs. of Bernalillo County*, 718 F.2d 777 (10th Cir. 1985)).

The decisions in the cross and the seal cases have been founded on two observations. First, courts have repeatedly emphasized that the cross is and remains a religiously-charged symbol — indeed, not a symbol of religion generally, but of one particular sect. As the opinions elaborate, the cross is an emblem of Christianity's origins and history, possessing an emotional power of great dimension. Second, courts have recognized that a municipal seal quite literally puts the government imprimatur on whatever it touches and, by implication, whatever it includes in its design. As definitely as a trademark, a city's seal encapsulates its municipal identity, history, and authority; inescapably, it exudes endorsement and approval of the aspects of municipal life represented by its elements.

These two observations have been the basis for two unswerving lines of authority resulting in the disapproval or apparent abandonment of the challenged crosses or municipal seals. These lines have twice intersected in cases like the present one, in which the challenged object is a government seal containing a cross. In both cases, the Courts of Appeal have roundly condemned the challenged seals and enjoined their use. *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991); *Friedman v. Board of County Commrs. of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985), *cert. denied*,

476 U.S. 1169; 106 S.Ct. 2690; 90 L.Ed.2d 978 (1986).

II.

Among the requirements imposed by the Establishment Clause is that the "principal or primary effect [of a government action] must be one that neither advances nor inhibits religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612; 91 S.Ct. 2105, 2111; 29 L.Ed.2d 745 (1971) (citation omitted). Adopting an approach first posited by Justice O'Connor, the Supreme Court has "refined" — or perhaps transformed — this requirement into a non-endorsement principle: the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community." *Allegheny*, 109 S.Ct. at 3101; *see also id.* at 3119 (O'Connor, J., joined by Brennan and Stevens, JJ., concurring in part and in the judgment) *id.* at 3124 (Brennan, J., joined by Marshall and Stevens, JJ., concurring in part and dissenting in part). This "prohibition against governmental endorsement of religion preclude[s] government from conveying . . . a message that religion or a particular religious belief is favored or preferred." *Id.* at 3101 (internal quotations, citations, and emphasis omitted; brackets in original). Likewise, the government may not "promote" religion; "[w]hether the key word is 'endorsement,' 'favoritism' or 'promotion,' the essential principle remains the same." *Id.*; *see also Ball*, 473 U.S. at 390; 105 S.Ct. at 3226 (inquiry is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents as the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."); *Larkin v. Grendel's Den*, 459 U.S. 116, 125-26; 103 S.Ct. 505. 511-12; 74 L.Ed.2d 297 (1982) (disapproving a statute that "provide[d] a significant symbolic benefit to religion in the minds of some").

Furthermore, the fact that government may not intend to promote religion does not legitimize the government's embracement of a religious activity; the constitutional evil is complete even when government merely "*appear[s]* to take a position on ques-

tions of religious belief," *Allegheny*, 109 S.Ct. at 3101 (emphasis added), or when it "makes[s] religion relevant, in reality *or public perception*, to status in the political community." *Id.* at 3119 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added); *see also Harris*, 927 F.2d at 1415 (similar, citing *Friedman*, 781 F.2d at 781). This is true "irrespective of government's actual purpose." *Lynch v. Donnelly*, 465 U.S. 668, 690; 104 S.Ct. 1355, 1368; 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring). In short, a governmental practice is impermissible if it "*either* has the purpose *or* effect of endorsing religion." *Allegheny*, 109 S.Ct. at 3100 (emphasis added; internal quotations omitted).

Courts conduct the endorsement inquiry from the standpoint of a "reasonable observer." *See Allegheny*, 109 S.Ct. at 3115 (Blackmun, J.), 3121 (O'Connor, J., joined by Brennan and Stevens, JJ., concurring in part and in the judgment), 3127 (Brennan, J., joined by Marshall and Stevens, JJ., concurring in part and dissenting in part); *See also The Supreme Court — Leading Cases*, 103 Harv.L.Rev. at 234 n. 44. The reasonable observer is one who is particularly sensitive to the message that the challenged symbol may convey to those who do not adhere to the religion associated with that symbol. As Justice Kennedy summarized the endorsement test, "the touchstone of an Establishment Clause violation is whether nonadherents would be made to feel like 'outsiders' by government recognition or accommodation of religion." *Allegheny*, 109 S.Ct. at 3142 (Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ., concurring in the judgment in part and dissenting in part); *see also id.*, 109 S.Ct. at 3119 (O'Connor, J., joined by Brennan and Stevens, JJ., concurring in part and concurring in the judgment) ("[T]he endorsement test captures the essential command of the Establishment Clause . . . government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.").

That the endorsement inquiry stresses the nonadherents' viewpoint is scarcely surprising. The first amendment prohibition against "law[s] respecting an establishment of religion" clearly

benefits the minority, not those whose religions might otherwise receive government endorsement. Indeed, the Religion Clauses would have little purpose if interpreted principally from the standpoint of majorities already well-protected by the political process. Majoritarian adherents, construing a government action devoid of religious purpose, may not perceive the endorsement message that the minority receives with stinging clarity. Only through sensitivity to the nonadherent can we effect the constitutional values inherent in the Religion Clauses. *Cf. Ellison v. Brady*, 924 F.2d 872 (878-80) (9th Cir. 1991) (adopting perspective of "reasonable woman" in order to effect statutory aim of sex discrimination statute). Yet, by insisting that the test be an objective one — a "reasonable nonadherent" test — the endorsement inquiry retains the ability to discount the perceptions of a hypersensitive plaintiff.

By including a Latin cross in its insignia, the City of Austin has conveyed to the reasonable nonadherent, albeit unintentionally, that it endorses the Christian faith. A fact-intensive scrutiny of the nature of the challenged symbol and the context in which it appears proves this point. *See Allegheny*, 109 S.Ct. at 3103; *Harris*, 927 F.2d at 1412 & n. 11; 103 Harv.L.Rev. at 230.

A.

The cross is the paradigmatically Christian symbol — "the principal and unmistakable symbol of Christianity as practiced in this country today," *Harris*, 927 F.2d at 1403 (citing *St. Charles*, 794 F.2d at 267 (Posner, J.)) — as recognizably emblematic of that creed's two-thousand year history as the flag is of our "two hundred years of nationhood." *Smith v. Goguen*, 415 U.S. 566, 603; 94 S.Ct. 1242, 1262; 39 L.Ed.2d 605 (1974) (Rehnquist, J., dissenting); *see also Texas v. Johnson*, 491 U.S. 397; 109 S.Ct. 2533, 2548, 2552; 105 L.Ed.2d 342 (1989) (Rehnquist, J., dissenting) (flag burning case). It symbolizes a singular event in the origin of the Christian faith the Crucifixion and Resurrection of Christ, as surely as Old Glory, with its thirteen stripes, symbolizes the founding of our nation. The Supreme Court has described the Christian cross in terms that leave no doubt as to its power:

> Symbolism is a primitive but effective way of conveying ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the alter and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632; 63 S.Ct. 1178, 1182; 87 L.Ed. 1628 (1943), *quoted in part in Texas v. Johnson*, 491 U.S. 397; 109 S.Ct. 2533, 2539; 105 L.Ed.2d 342 (1989); *see also Greater Houston Chapter of ACLU v. Eckels*, 589 F.Supp. 222, 234 (S.D.Tex.1984) (cross is "primary symbol[] for Christianity"), *appeal dismissed*, 755 F.2d 426 (5th Cir.), *cert. denied*, 474 U.S. 980; 106 S.Ct. 383; 88 L.Ed.2d 336 (1985); *Hewitt v. Joyner*, 705 F.Supp. 1443, 1449 (C.D.Cal. 1989) ("preeminent symbol"), *judgment reversed*, 940 F.2d 1561, 1568 (9th Cir. 1991) (holding that park display of immovable statuary depicting scenes from the New Testament violated the California constitution's establishment clause provision).

As inspirational a symbol as the cross may be to Christians, its effect on non-Christians is likely to be quite different. As the Supreme Court observed with regard to symbols generally, "what is one [person]'s comfort and inspiration is another's jest and scorn." *Barnette*, 319 U.S. at 633; 63 S.Ct. at 1183. A cross may, at the very least, "stand[] as a dramatic reminder [to non-believers] of their differences with Christian faith." *Lynch*, 465 U.S. at 708 & n. 14; 104 S.Ct. at 1377 & n. 14 (Brennan, J., dissenting). Indeed, "[t]he effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not worthy of public recognition nor entitled to public support." *Id.* at 701; 104 S.Ct. at 1374 (Brennan, J., dissenting) (footnote omitted). More grimly, the Tenth Circuit has explained that the cross carries with it a strong message, for

it has

> at times symbolized outright oppression and persecution of Jewish people. It cannot be denied . . . that the cross probably would have a similarly threatening connotation for a Lebanese Moslem or Northern Irish Protestant. We are compelled to draw the same conclusion with regard to the reactions of Native Americans. . . . The seal certainly does not memorialize their "Christian heritage" but rather that of those who sought to extinguish their culture and religion.

Friedman, 781 F.2d at 781-82. The Seventh Circuit has reminded us that

> The crossed burned by the Klu [*sic*] Klux Klan are Latin crosses; and the burning cross, symbol of bigotry that it is, continues to remind of the Christian symbol that the Klan has appropriated to its sinister purposes. The . . . cross unmistakably signifies Christianity, as the reindeer and Santa Claus, and even the star and the wreath do not.

ACLU v. City of St. Charles, 794 F.2d 265, 273 (7th Cir. 1986).

One would be hard-pressed to reconcile so religiously-fraught a symbol with the Establishment Clause, and, apparently, no federal case has done so. Whether planted on mountains, lit upon broadcasting antennas, erected at memorial sites and city parks, painted on water towers, affixed to government buildings, or, indeed, displayed on municipal seals, state-sponsored crosses — even where barely recognizable as such — have fallen in the wake of federal court challenges. *See e.g.*, *Harris*, 927 F.2d at 1414-15 (striking down seal); *Friedman*, 781 F.2d at 781-82 (same); *St. Charles*, 794 F.2d at 273 (enjoining display of cross on city building) (collecting cases); *Mendelson v. City of St. Cloud*, 719 F.Supp. 1065, 1069 (M.D.Fla. 1989) (holding that permanent display of cross on city water tower was unconstitutional: "no federal case has ever found the display of a Latin cross on public land by a state or state subdivision to be constitutional") (collecting cases); *Jewish War Veterans of United States v. United States*, 695

F.Supp. 3, 11-15 (D.D.C. 1988) (holding that cross could not be used as memorial to servicemen missing in action) (collecting cases); *ACLU of Georgia v. Rabun County*, 698 F.2d 1098, 1110 n. 23 (11th Cir. 1983) (upholding district court's ruling that display of cross in state park violated each prong of *Lemon* test) (collecting cases). *But cf. St. Charles*, 794 F.2d at 274 (collecting *state* cases allowing crosses to be displayed in contexts other than a city seal); *Rabun*, 698 F.2d at 1110 n. 23 (same).

Even the Supreme Court, in dicta, has spoken with a single, disapproving voice on this issue. *See Allegheny*, 109 S.Ct. at 3104 (Blackmun, J.) (majority opinion), 3120 (O'Connor, J., joined by Brennan and Stevens, JJ.) (citing *Friedman* with apparent approval), 3126 n.* (Brennan, J., joined by Marshall and Stevens, JJ.) (display of cross next to an Easter bunny used as example of display unlikely to "comport with Justice O'Connor's views"), 3132 (Stevens, J., joined by Brennan and Marshall, JJ.) 3137 (Kennedy, J., joined by Rehnquist, C.J. and White and Scalia, JJ.); *Lynch*, 465 U.S. at 695 & n. 1; 104 S.Ct. at 1370 & n. 1 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.) 701 n. 7; 104 S.Ct. at 1374 n. 7 (citing with approval California case disallowing erection of cross in front of city hall).

Several years ago, in a decision we let stand on procedural grounds, one of our own district courts ordered the removal of "three Latin-style crosses and a Star of David" from a county veterans' memorial. *Greater Houston Chapter of ACLU v. Eckels*, 589 F.Supp. 222, 241 (S.D.Tex. 1984) (decided on grounds of both religious purpose and effect), *appeal dismissed*, 755 F.2d 426 (5th Cir.), *cert. denied*, 474 U.S. 980; 106 S.Ct. 383; 88 L.Ed.2d 336 (1985). Most recently, the Seventh Circuit enjoined the use of a city seal containing a barely distinguishable cross. *Harris*, 927 F.2d 1401. Were he to reach the merits, even the panel's dissenter, Judge Easterbrook would have "condemn[ed]" the seal. *Harris*, 927 F.2d at 1425 (Easterbrook, J., dissenting on other grounds) ("The object of everyone's attention looks more like a telephone pole than a cross; its arms are to [*sic*] short to crucify anyone.") The cases are unambiguous: a cross displayed by the government is too emphatically sectarian a symbol to survive Establishment Clause scrutiny.

B.

The context in which the cross appears in this case makes matters only worse. Context encompasses three distinct aspects of the cross's presentation: its setting, its arrangement in relation to other elements in the setting, and its temporal "location" and duration. *Allegheny*, 109 S.Ct. at 3103-04.

The setting of this cross is, of course, the city insignia. Just as a cross is emblematic of the Christian religion, so too, the city insignia is emblematic of the City of Austin. The evidence establishes that the Austin insignia is pervasive; it appears on letterhead, utility bills, uniforms, vehicles, buildings, at outdoor sites and in the chambers of the City's representative government. Wherever the City wants its mark, the insignia is the mark it makes. The insignia, although lacking the transcendent power of a cross or national flag, is nonetheless the city's trademark, the symbol of its corporate existence, historical roots, and municipal authority. Austin's insignia "acts as the City's imprimatur for official correspondence, property and business." *See Harris*, 927 F.2d at 1412.

With this background, it is not surprising that every federal challenge to religious imagery of any sort on a city insignia has succeeded. Whether the religious element is a cross, a temple, or a word or phrase, its presence on a municipal insignia has been followed by its removal. As the *Harris* court explained:

> [T]he obvious presence of a Latin cross on the corporate seal of [a city] . . . endorses or promotes a particular religious faith. It expresses an unambiguous choice in favor of Christianity. It presents to any observer a clear endorsement of all those beliefs associated with a Latin cross in violation of the Establishment Clause of the first amendment.
>
> Like the seat of county government in *County of Allegheny*, or the City Hall Building in *American Jewish Congress [v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987)], the corporate seal of a municipality is "plainly under government control . . . (and is) a clear symbol of government power." . . . The Latin cross on the seal, then, brings together church

> and state in a manner that suggests their alliance perhaps even more ardently than the unconstitutional crèche displays in *County of Allegheny* or *American Jewish Congress*. . . . The conspicuous depiction of the pre-eminent symbol of a particular faith on that seal conveys a message of approval that is simply inconsistent with the first amendment.

Harris, 927 F.2d at 1412. Like the crèche invalidated in *Allegheny*, "[n]o viewer could reasonably think" that the cross occupies so central a location on the seal "without the support and approval of the government." *Allegheny*, 109 S.Ct. at 3104 (majority opinion).

The second element of context is what might be called "arrangement," meaning the placement and effect of the elements of the challenged display. Two principles have emerged from recent cases. The first is that neutral objects surrounding a religious symbol may have the effect of "framing" the symbol, making it more visible and its religious message more prominent. Thus, "[t]he floral decoration surrounding the [*Allegheny*] crèche . . . [is a] frame . . . [which] serves only to draw one's attention to the message inside the frame"; it "contributes to, rather than detracts from, the endorsement of religion conveyed by the crèche." *Id.*

The cross on Austin's insignia is framed by objects that serve to "draw one's attention to the message inside the frame." *Allegheny*, 109 S.Ct. at 3104 (majority opinion). Most literally, the cross is framed by a pair of wings. Equally effective is the arrangement of the light stripe and the lamp of knowledge, which draw the viewer's attention to the cross. The insignia's contrasting colors have a similar effect.

The second principle emerging from the Supreme Court analysis of physical arrangement is that, in holiday displays, the *non-religious* meaning of a religious object may be enhanced by the placement of other objects appropriate to the season, at least so long as such objects have their "own focal point[s]" and "specific visual stor[ies] to tell." *Allegheny*, 109 S.Ct. at 3104. Thus, explained the Court, the Santa Claus and "talking wishing well" in *Lynch* rendered a crèche acceptable by tying it to the secular as-

pects of the Christmas season. *Id.* at 3103-04; *see also id.* at 3112. This secularizing effect, which might ameliorate what would otherwise be a constitutional violation, does not occur in the Austin insignia. True, the insignia does include other symbolic elements, specifically the capitol building and the lamp. But these elements relate to no holiday and share no meaning in common with the cross other than their representation of institutions within the city. Under *Allegheny*, such mere coexistence is inadequate to secularize the cross. *Id.* at 3103-04.

Nor is the cross's message muted by its presence in a secular venue, the insignia itself. *See Harris*, 927 F.2d at 1425 (Easterbrook, J., dissenting on other grounds) ("Governance is not a 'context' that drains the significance of a religious image.") (discussing presence of cross and secular elements on city seal); *see also Eckels*, 589 F.Supp. at 235 (message conveyed by cross is "purely religious" and is "not lost when [it is] removed from the churches . . . with which it is traditionally associated"). In this respect, a city insignia is quite unlike, for example, a county art museum, whose essential nature as a neutral showplace does tend to negate a message of endorsement of any religious paintings displayed there. *See Lynch*, 465 U.S. at 692; 104 S.Ct. at 1369 (O'Connor, J., concurring) (describing how museum context negates endorsement message); *Hewitt v. Joyner*, 940 F.2d 1561, 1568 (9th Cir. 1991) (same). A municipal insignia, unlike a municipal museum, is neither intended nor understood as a neutral presentation of diverse images for the viewer's edification and amusement, any more than Old Glory serves as a trifling display of stripes and stars.

The lamp and capitol building, far from secularizing the cross, actually *enhance* the impact of its religious message. Like the Rolling Meadows seal rejected in *Harris*, Austin's insignia is no mere catalog of "neutral snapshots of the community"; rather, the images on the insignia "are charged with endorsement." *Harris*, 927 F.2d at 1412. Who could sensibly assume that the City's leaders have a neutral attitude towards the presence of the state capitol, or that they are indifferent to "the educational advantages of the city" when its insignia contains a Christian cross superimposed over a silhouette of the state capitol building and

placed above a lamp representing Austin's schools and universities, the two most significant institutions in the City? The lamp and capitol epitomize the City's municipal identity; the glow of governmental endorsement with which they are surrounded bathes the cross as well. To any reasonable observer, Austin's insignia "expresses the City's approval of those [three] pictures of City life — . . . its schools," its role in state governance, "and its Christianity." *Harris*, 927 F.2d at 1412.

The final element of context is temporal: when does the government display occur and for how long? In the case of the *Allegheny* Christmas tree and menorah, one factor contributing to the acceptability of the display was its appropriateness to the holiday season — a "location" in time that tended to secularize the display's elements, because the holiday season to which they were tied was recognized as having both secular and spiritual aspects. The caselaw also hints that the short duration of such seasonal displays is to their benefit. *See, e.g., Eckels*, 589 F.Supp. at 235 (alluding to the "temporary governmental celebration of a religious holiday that has acquired some secular flavor"). In any event, the Austin city insignia can claim the benefit of neither of these factors; it is the emblem of no holiday and is a permanent fixture on the city's insignia.

III.

A cross need not be erected on a mountaintop to become worthy of judicial scrutiny. Though small, the cross in Austin's insignia is clearly visible even in the black-and-white reproduction appearing in the law books, not to mention the clarity it may take on when rendered in contrasting colors. Even at a distance of four feet, the cross in the reproduction remains recognizable for what it is, a Christian cross. The same cannot be said for the cross on the seal recently disapproved by the Seventh Circuit, which resembled — at any distance — nothing so much as a telephone pole in front of a factory. *Harris*, 941 F.2d at 1419 (Easterbrook, J., dissenting). I am therefore unpersuaded by the majority's effort to distinguish *Harris* on the ground that "the Rolling Meadows' seal arguably conveys a message of its being a 'Christian community' " whereas Austin's insignia purportedly

does not. *See* majority slip op. at page —. I am simply unimpressed by the fact that the cross occupies only a small percentage of the insignia's surface area in its various versions. *See* majority slip op. at page 841 n. 11 ("cross in Austin's insignia occupies a displacement area 0.12% to 0.4%"). The constitutional significance of the cross's presence in the Austin insignia cannot be reduced to some geometrical equation. Measuring a cross in terms of "displacement area" understates the cross's visual impact since the essentially linear nature of a cross gives it a relatively small surface area. Though I claim no modicum of expertise in mathematics, I would suppose that even a cross mounted atop city hall, for example, would occupy a similarly negligible percentage of the surface area of the facade of the building. But surely no court would find that display constitutional.[1] *See St. Charles*, 794 F.2d at 273 (upholding preliminary injunction prohibiting display of cross atop a firehouse during Christmas season).

The cross is not a "passive" symbol of a holiday season, as some have characterized a crèche, menorah, and Christmas tree. *See Allegheny*, 109 S.Ct. at 3139 (Kennedy, J., dissenting). Nor does it bear any resemblance to legislative prayer, "In God We Trust," "God save this honorable Court," and other ritual invocations approved by the Supreme Court. The Court's approval stems from its conclusion that these instances of reflexive theism are nonsectarian, have largely lost their religious nature over time, and, in some cases at least, serve the secular function of solemnifying public occasions. *See Allegheny*, 109 S.Ct. at 3120-21; *Lynch*, 465 U.S. at 693; 104 S.Ct. at 1369; *see also Jones v. City of Clear Creek*, 930 F.2d 416, 421-22 (5th Cir. 1991) (upholding constitutionality of nonsectarian invocations and benedictions at high school graduation ceremony); 103 Harv.L.Rev. at 237. Whatever one may think of this reasoning, the exception is quite

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[1]I suppose that if we were forced to resort to a mathematical formula to resolve this case, I would suggest that we compare the height of the cross in relation to the diameter of the insignia; this ratio, in one version of the seal, is 1 to 8, or 12.5%. I would submit that such a ratio is far more telling of the visual impact of the seal than a measure of displacement area.

narrow; change the inscription on our coinage to "Jesus Saves," "Allah Be Praised," or "Sha'ma Yisroel," and no exception will avert an injunction. Minting a seal with a cross yields no greater seigniorage. The Christian cross has retained its religious nature for two thousand years and serves no secular function on the insignia. *See St. Charles*, 794 F.2d at 271 (Posner, J.) ("the Latin cross has not lost its Christian identity"). The exception is simply inapplicable.[2]

Although the majority "view[s] any perceived preference by use of the insignia to be even more remote than" the display of holiday symbols or the invocation of legislative prayer, majority slip op. at pages 838-39 (referring to *Lynch*, *Allegheny*, and *Marsh*), the majority fails to identify a secular facet to the cross. There is none. Displayed prominently in the context of a city's insignia, it conveys an unmistakable message of religious — indeed sectarian — endorsement.

IV.

A little accommodation is a dangerous thing — the flood waters may not be far behind. We cannot discount this case as implicating nothing more than a trivial display, because in doing so, we establish a precarious precedent in the First Amendment forum. Religious symbols, when widely recognized as such, have no place in a city's emblem.

I agree with Judge Easterbrook when he says that "we ought to use bright line rules" in this very sensitive area of constitutional jurisprudence and "condemn the use of any religious imagery not

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[2]*Marsh v. Chambers*, 463 U.S. 783; 103 S.Ct. 3330; 77 L.Ed.2d 1019 (1983), relied upon heavily by the majority, is no saving grace. It must be read for what it is: a very narrow opinion on the singular issue of legislative prayer in the context of its "unique history." Any effort to extend *Marsh* beyond the particular facts of that case is a reach, and not surprisingly, *Marsh* has been distinguished and construed narrowly by those courts confronting even factually similar cases. *See, e.g. North Carolina Civil Liberties Union Legal Foundation v. Costagny*, — F.2d —, 1991 WL 212995 (4th Cir. Oct. 23, 1991) (upholding injunction against state judge prohibiting him from opening his courtroom proceedings with a prayer).

nestled in a secular context." *Harris*, 927 F.2d at 1425 (Easterbrook, J., dissenting). Otherwise, we judges will be immersed in the minutiae of graphic design, our rulers and calipers in hand, scrutinizing each symbol for acceptable proportion, color, and gloss. With no principled basis for distinguishing one seal from the next, our opinions will be fastidiously fact-bound and our precedent hopelessly abstract.

I fear that the majority takes the first wobbly step in that direction. The road they will travel is no Appian Way. I would rather that we steer away from that course and follow the path of our sister circuits instead. Not prepared to join my colleagues on their perilous journey, I respectfully dissent.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8561

JON G. MURRAY, and Society
of Separationists, Inc., Plaintiff-Appellants

v.

CITY OF AUSTIN, TEXAS and
Travis County, Texas, Defendants-
Appellees

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING
December 3, 1991

Before GOLDBERG, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

s/ RHESA H. BARKSDALE
United States Circuit Judge